

Unfolding Africa's Impact on the Development of International Refugee Law

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Abstract

This article traces the contributions of African states to the development of international refugee law and explores the role African human rights supervisory bodies have played in the interpretation and application of this field of law. While Africa's contributions to international refugee law are often overlooked, this article sets out to identify Africa's involvement in the drafting process of the UN Refugee Convention and its 1967 Protocol. It also explores the legal framework for refugees in Africa, in particular the OAU Refugee Convention and the Bangkok Principles on Status and Treatment of Refugees, and the extent to which these two instruments have enriched international refugee law. The article argues that some of their provisions may provide evidence of customary rules of international law. Lastly, it examines some of the authoritative pronouncements made by African human rights supervisory bodies, in so far as they adopt a progressive approach to interpreting the rights of refugees and asylum-seekers.

Keywords

Refugee definition, 1951 Refugee Convention, 1969 OAU Convention, Bangkok Principles, African human rights system, African states

INTRODUCTION

Among the most important African contributions to the development of international refugee law are the expanded refugee definition and the recognition of the principle of *non-refoulement*¹ in its widest sense. These

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1 This principle prohibits states from returning refugees or asylum-seekers to territories where there is a risk that their life or freedom would be threatened.

contributions, which have been the subject of extensive scholarly debate, are reflected in the 1969 Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention). Yet, as this article seeks to demonstrate, some of Africa's contributions to this field of law are also reflected in earlier regional instruments, particularly the 1966 Bangkok Principles on Status and Treatment of Refugees (Bangkok Principles) adopted by the Asian-African Legal Consultative Committee (AALCC),² as well as in the legislative history of the 1951 UN Convention Relating to the Status of Refugees (UN Refugee Convention) and its subsequent 1967 Protocol (1967 Protocol). While most of Africa was still part of colonial empires during the drafting process of the UN Refugee Convention itself, later problems associated with decolonization in Africa and Africa's own initiative to deal with the resulting movements of refugees were at the centre of the negotiations leading to the 1967 Protocol. The international legal framework for refugees had thus to accommodate and reflect the full scope of interests of the "new" members of the international community. Although their influence did not result in a complete overhaul of this field of law (which remains very much linked to its European origins), African states contributed to reshaping international refugee law, in particular the scope of the refugee definition, to reflect their interests and needs. The African human rights system, founded on the African Charter on Human and Peoples' Rights (African Charter), has further developed protection standards that often adopt a generous approach to the protection of refugees and asylum-seekers. Furthermore, supervisory bodies entrusted with human rights promotion and protection within the African human rights system, although subject to some constraints, continue to contribute to the progressive development of international refugee law.

The purpose of this article is to bring into the legal debate on refugee protection the, arguably often overlooked, contribution of African states and the African human rights system to this field of law. Divided into three parts, the article begins by identifying Africa's contributions to the drafting process of international instruments relating to the legal status of refugees adopted before 1951, as well as the UN Refugee Convention and its 1967 Protocol. It explores the proposal that led the drafters of the UN Refugee Convention to extend its application to other groups, as well as the circumstances triggering the revision of the convention.³ The article then moves on to provide an overview of the legal framework for refugees in Africa. It considers not only the

2 The AALCC was founded to serve as an advisory body in the field of international law and as a forum for Asian-African cooperation. See: <<http://www.aalco.int/39thsession/aalccairol.pdf>> (last accessed 28 December 2020). It is now called the African-Asian Legal Consultative Organization (AALCO).

3 Under the Vienna Convention on the Law of Treaties 1969 (Vienna Convention), art 32, the preparatory work of a treaty serves as a supplementary means of interpreting the text (in this case, the UN Refugee Convention and the 1967 Protocol). Also, the Vienna Convention, art 31 states that a "treaty shall be interpreted in good faith in accordance

OAU Refugee Convention, but also the Bangkok Principles, which were formulated following a reference by the only African member of the AALCC at that time: the government of Egypt.⁴ In doing so, the article revisits the extent to which these two instruments have enriched international refugee law.⁵ Lastly, the article takes a non-exhaustive look at some of the authoritative pronouncements made by African human rights supervisory bodies in so far as they adopt a progressive approach to the interpretation of the rights of refugees and asylum-seekers. In so doing, it explores the role these regional bodies play in the interpretation and application of international refugee law.

THE BEGINNINGS AND EVOLUTION OF THE UNIVERSAL REFUGEE DEFINITION: RETHINKING AFRICA'S CONTRIBUTIONS

UN Convention Relating to the Status of Refugees

Following the League of Nations' adoption of various arrangements relating to the legal status of specific categories of refugees,⁶ in 1928 the League of Nations Council created the Inter-Governmental Advisory Commission on Refugees.⁷ This commission was of the opinion that a formal convention would, inter alia, be "the most effective means of assuring refugees of stability for their legal status".⁸ It recommended that governments interested in a solution to the refugee problem be invited to a conference "for the purpose of drawing up and adopting a final text of the Convention, to be open to subsequent accessions".⁹ Based on the number of refugees to whom they had extended "hospitality", 13 states were listed as the "most interested in solving the refugee problem", among which was Egypt.¹⁰ In 1933, after a three-day meeting attended by representatives of 13 European countries,¹¹ China and

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with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

4 "Status and treatment of refugees" (AALCO, 39th session) at 1, available at: <<http://www.aalco.int/39thsession/strcairoIV.pdf>> (last accessed 28 December 2020).

5 This article does not consider the African Union Convention for the Protection and Assistance of Internally Displaced Persons, 2009 (the Kampala Convention).

6 These included Russian and Armenian refugees and later Assyrian, Assyro-Chaldean persons of Syrian or Kurdish origin, and persons of Turkish origin. See, for example, CM Skran "Historical development of international refugee law" in A Zimmermann (ed) *1951 Convention Relating to the Status of Refugees and Its 196 Protocol: A Commentary* (2011, Oxford University Press) 6.

7 RJ Beck "Britain and the 1933 Refugee Convention: National or state sovereignty?" (1999) 11/4 *International Journal of Refugee Law* 597 at 604.

8 Id at 604, footnote 37.

9 Id at 608.

10 Ibid.

11 These were Austria, Belgium, Bulgaria, Czechoslovakia, Estonia, Finland, France, Greece, Latvia, Poland, Romania, Switzerland and Yugoslavia. Thereafter, the 1933 Refugee Convention was ratified by Belgium, Bulgaria, Czechoslovakia, Denmark, France, Great Britain, Italy and Norway.

Egypt, a Convention Relating to the International Status of Refugees (1933 Refugee Convention) was subsequently adopted.¹² Contracting parties could introduce modifications or amplifications at the moment of signature or accession to the convention. Interestingly, when signing the convention, unlike its European counterparts, the government of Egypt specified that “it reserved the right to *expand* or limit the definition given in the Convention as it wished”.¹³ In 1946, under the auspices of the Economic and Social Council, the International Refugee Organization Constitution was adopted, which laid down certain broad criteria that foreshadowed the definition of refugee that would later appear in the UN Refugee Convention.¹⁴ Remarkably, the delegate of Egypt, the only African state among the 18 states that became members of the constitution, proposed, though unsuccessfully, that the phrase “concerning displaced persons” be deleted from section 1B of annex I. This deletion would have meant that repatriation was advisable for both refugees and displaced persons.¹⁵

The main contributors to the drafting of the UN Refugee Convention, particularly at the earlier stages of the drafting process, were representatives from western European powers.¹⁶ At the opening session of the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, which adopted the UN Refugee Convention itself, 23 states were represented, among which only four were “non-western”: Egypt, Colombia, the former Yugoslavia and Iraq. The other states represented were Australia, Canada, USA, Israel and 15 European states (including Turkey).¹⁷ With regard to the refugee definition, the views expressed during the discussions show two different approaches: those who feared a general definition and advocated for a precise definition listing specific categories of refugees; and those who wished to see a general definition applicable to all refugees.¹⁸ For instance, France’s

12 However, it limited its scope to those groups already considered refugees by early agreements of the League of Nations. See 1933 Refugee Convention, art 1.

13 Emphasis added. “UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary record of the nineteenth meeting” (26 November 1951), UN doc A/CONF.2/SR.19, available at: <<https://www.unhcr.org/protection/travaux/3ae68cda4/conference-plenipotentiaries-status-refugees-stateless-persons-summary.html>> (last accessed 28 December 2020). Although Egypt signed the 1933 Refugee Convention, it never ratified it.

14 International Refugee Organization Constitution, sec A(1)(c) included the elements of “for reasons of race, religion, nationality or political opinion” as requirements to qualify for refugee status. Moreover, annex I, sec C(1)(a)(i) allowed for individuals validly to object to repatriation on the basis of “*persecution, or fear, based on reasonable grounds of persecution because of race, religion, nationality or political opinions*” (emphasis added).

15 H Adelman and E Barkan *No Return, No Refugee: Rites and Rights in Minority Repatriation* (2011, Columbia University Press) at 300, footnote 39.

16 F Viljoen “Africa’s contribution to the development of international human rights and humanitarian law” (2001) 1/1 *African Human Rights Law Journal* 18 at 25.

17 T Einarsen “Drafting history of the 1951 Convention and the 1967 Protocol” in Zimmermann (ed) *1951 Convention*, above at note 6, 40 at 59.

18 C Harvey *Seeking Asylum in the UK: Problems and Prospects* (2000, Butterworths) at 25.

delegate proposed inserting the words “in Europe” after the phrase “as a result of events occurring”.¹⁹ The Italian delegation supported the French amendment to “restrict the application of the Convention to European refugees alone”.²⁰ In contrast, the British delegate wished to see the adoption of a general definition that would not be confined to European refugees alone.²¹ Likewise, the Egyptian delegate agreed that the “definition was broad, but that was exactly how it should be”.²² He emphasized that the aim of his delegation “was to grant to *all* refugees the status for which the Convention provided”, stressing that “withhold[ing] the benefits of the Convention from certain categories of refugee would be to create a class of human beings who would enjoy no protection at all”.²³ To support his claim, he pointed to article 6 of chapter II of the Statute of the Office of the UN High Commissioner for Refugees (UNHCR, UNHCR Statute), which had made the refugee definition applicable to “*all* categories of refugees”.²⁴ Within this context, the Egyptian delegation submitted an amendment to expand the scope of the UN Refugee Convention to cover other groups of refugees.²⁵ While the situation of Palestinian refugees seems to have been the main reason triggering his proposal, the Egyptian representative highlighted that the convention “should ... apply to *all* categories of refugees”.²⁶ In the words of the Egyptian delegate, “any limitation of the Convention in time or in space could only weaken [the protection of refugees]”.²⁷ Moreover, it should be recalled that, when signing the 1933 Refugee Convention (before the Palestinian exodus), the government of Egypt had already reserved the right

19 UN General Assembly (GA) “Draft Convention Relating to the Status of Refugees. France: Amendment to article 1” (13 July 1951), UN doc A/CONF.2/75, available at: <<https://www.unhcr.org/protection/travaux/3ae68ce870/draft-convention-relating-status-refugees-france-amendment-article-1.html>> (last accessed 28 December 2020).

20 “Summary record of the nineteenth meeting”, above at note 13.

21 Harvey *Seeking Asylum in the UK*, above at note 18 at 25.

22 Ibid.

23 Ibid (emphasis added).

24 Ibid (emphasis added). See also art 6(B) of the UNHCR Statute (adopted 14 December 1950), UN doc A/RES/428(V).

25 The amendment reads: “When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the United Nations General Assembly, they shall ipso facto be entitled to the benefit of this Convention”: GA “Draft Convention Relating to the Status of Refugees. Egypt: Amendment to article 1” (3 July 1951), UN doc A/CONF.2/13, available at: <<https://www.unhcr.org/protection/travaux/3ae68ce1c/draft-convention-relating-status-refugees-egypt-amendment-article-1.html>> (last accessed 28 December 2020).

26 “Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary record of the twenty-ninth meeting” (GA, 28 November 1951), UN doc A/CONF.2/SR.29 (emphasis added), available at: <<https://www.refworld.org/docid/3ae68cdf4.html>> (last accessed 28 December 2020).

27 Ibid.

to *expand* the refugee definition given in that convention.²⁸ Egypt's amendment was finally adopted by 14 votes to two, with five abstentions, and found its recognition in the second sub-paragraph of article 1(D) of the UN Refugee Convention.

The definition of the term "refugee" was enshrined in article 1(A) of the UN Refugee Convention, which was however limited temporally, applying only to refugees who had been displaced "as a result of events occurring before 1 January 1951".²⁹ Additionally, by making a declaration, contracting states could specify that such "events" would only mean "events occurring in Europe".³⁰

1967 Protocol Relating to the Status of Refugees

In the 1960s, the newly independent African states had not much incentive for becoming parties to the UN Refugee Convention "because of the non-universality of the refugee definition".³¹ Only 11 African states became parties to the convention or informed the UN Secretary-General that they considered themselves bound by it.³² Of these states, the Central African Republic and Togo made a declaration whereby they interpreted the term "events occurring before 1 January 1951" in the refugee definition to mean "events occurring in Europe or elsewhere before 1 January 1951", thus widening the scope of their obligations under the convention.³³ African states saw the UN Refugee Convention as a "European instrument" that did not actually reflect their interests or the particular needs of African refugees.³⁴ Indeed, subsequent geopolitical events, such as decolonization and independence struggles in Africa and the resulting movements of refugees, made it obvious that refugees were neither temporary nor confined to Europe.

In 1964, UNHCR started to consider the possibility of completely removing the temporal and geographical limitations from the UN Refugee Convention as the only way to secure the relevance of the UN Refugee Convention with

28 "Summary record of the nineteenth meeting", above at note 13.

29 See UN Refugee Convention, art 1(A)(2).

30 See *id.*, art 1(B)(1).

31 Einarsen "Drafting history", above at note 17 at 69.

32 These are Algeria, Cameroon, Central African Republic, Congo (Brazzaville), Côte d'Ivoire, Dahomey, Ghana, Morocco, Niger, Togo and Tunisia. See GA "Report of the United Nations High Commissioner for Refugees: Supplement no 11" (1 January 1964), UN doc A/5511/Rev.1, annex II, para 5, available at: <<https://www.unhcr.org/en-ik/excom/unhcrannual/3ac68c3f4/report-united-nations-high-commissioner-refugees.html>> (last accessed 28 December 2020).

33 *Id.*, para 1.

34 See for example, P Weis "The Convention of the Organisation of African Unity Governing the Specific Aspects of Refugee Problems in Africa" (1970) 3 *Revue des Droits de l'Homme* 449. See also MB Rankin "Extending the limits or narrowing the scope? Deconstructing the OAU refugee definition thirty years on" (2005) (UNHCR New Issues in Refugee Research working paper no 13) at 4.

respect to other categories of refugees, including African refugees.³⁵ A Colloquium on the Legal Aspects of Refugee Problems, held in Bellagio on 28 April 1965 (Bellagio Colloquium), considered *inter alia* these limitations and the possible measures by which the UN Refugee Convention might be adapted to new refugee groups “for whom no appropriate legal instrument exist[ed]” at that time.³⁶ Particular reference was made to the fact that regional organizations were contemplating the adoption of regional instruments for the protection of refugees in their particular areas.³⁷ Indeed, at that time, the OAU had started its own work on a refugee convention designed to meet regional exigencies and be separate from the UN Refugee Convention.³⁸ Its draft article 31 “provided that the African refugee convention would supersede all preceding bilateral and multilateral agreements relating to refugees”.³⁹ The members of the Bellagio Colloquium agreed that, while it was appropriate to adopt measures to deal with refugee problems at a regional level, these should be “supplementary to measures adopted on a universal level”.⁴⁰ Within this context, the Bellagio Colloquium agreed to adapt the UN Refugee Convention by means of a protocol that would apply to new refugee situations that had arisen after 1951.⁴¹

In 1966, UNHCR submitted a proposal to, *inter alia*, the contracting states to the UN Refugee Convention, in which it proposed extending the personal

35 Einarsen “Drafting history”, above at note 17 at 70. See also “Colloquium on the Legal Aspects of Refugee Problems (note by the High Commissioner)” (GA, 5 May 1965), UN doc A/AC.96/INF.40, para 2, available at: <<https://www.unhcr.org/protection/colloquia/3ae68bea8/colloquium-legal-aspects-refugee-problems-note-high-commissioner.html>> (last accessed 28 December 2020).

36 “Colloquium on the Development in the Law of Refugees with Particular Reference to the 1951 Convention and the Statute of the Office of the United Nations High Commissioner for Refugees held at Villa Serbelloni Bellagio (Italy) from 21–28 April 1965: Background paper submitted by the Office of the United Nations High Commissioner for Refugees, Palais des Nations, Geneva, Switzerland, 1965” (UNHCR, 28 April 1965), UN doc MHCRC/23/65, para 10, available at: <<https://www.unhcr.org/protection/colloquia/3ae68be77/colloquium-development-law-refugees-particular-reference-1951-convention.html>> (last accessed 28 December 2020).

37 “Colloquium on the Legal Aspects”, above at note 35, para 9.

38 During the first stages of the drafting process of the OAU Refugee Convention, some delegates proposed a refugee definition totally independent of that in the UN Refugee Convention, including individuals compelled to flee “owing to aggression by another state, or as a result of an invasion by an aggressive state”: E Arboleda “Refugee definition in Africa and Latin America: The lessons of pragmatism” (1991) 3/2 *International Journal of Refugee Law* 185 at 190–94.

39 M Sharpe *The Regional Law of Refugee Protection in Africa* (2018, Oxford University Press) at 25. For more details about the drafting history of the OAU Refugee Convention, see *id* at 22–34.

40 “Colloquium on the Legal Aspects”, above at note 35, para 9.

41 *Id*, para 4. The UN High Commissioner for Refugees stated that, “in the last few years [he] had to interest himself, *inter alios*, in the following new groups of refugees: Algerian refugees, Rwandese refugees, Sudanese refugees, refugees from Angola and from Portuguese Guinea”: “Colloquium on the Development”, above at note 36, para 6.

scope of that convention.⁴² At the session of the UNHCR Executive Committee (ExCom) in 1966, Dr Schnyder, the then High Commissioner for Refugees, explained the background to the proposal. The meeting record, as subsequently shown, proves that UNHCR sought to preserve the primacy of the UN Refugee Convention worldwide, also in Africa.⁴³ Pointing in particular to the ongoing work of the OAU, Dr Schnyder emphasized that regional instruments “should not in any way supplant the 1951 [Refugee] Convention”.⁴⁴ He went on to highlight the importance of bringing the status of refugees in Asia and Africa into line with the treatment of refugees covered by the UN Refugee Convention, so as to make the latter a “truly universal document”.⁴⁵ UNHCR, in parallel, was also contributing to the negotiations leading to the OAU Refugee Convention. Its involvement finally led to the OAU Refugee Convention taking a form complementary to the UN Refugee Convention, thereby ensuring the relevance of a rather European-led refugee law system over a (more progressive) regional instrument.⁴⁶

A protocol to the UN Refugee Convention was formally adopted by the UN on 31 January 1967 and entered into force in October of the same year (1967 Protocol). While the substance of the refugee definition remained identical, the 1967 Protocol removed the temporal and geographic limitations from the convention.

AFRICAN REGIONAL INSTRUMENTS ON REFUGEE PROTECTION: THEIR IMPACT IN THE REGION AND BEYOND

In addition to their contributions to the drafting of the UN Refugee Convention and 1967 Protocol, African states have established regional

42 Einarsen “Drafting history”, above at note 17 at 70. See also A Corkery “The contribution of the UNHCR Executive Committee to the development of international refugee law” (2006) 13 *Australian International Law Journal* 97 at 101.

43 Ibid.

44 Id at 71.

45 Ibid. UNHCR has reiterated the primacy of the UN Refugee Convention over the years. For instance, in 2001, the ExCom “recogniz[ed] the enduring importance of the 1951 Convention, as the primary refugee protection instrument”: “Agenda for protection” (GA, 26 June 2002), UN doc A/AC.96/965/Add.1, para 2, available at: <<https://www.unhcr.org/3d3e61b84.pdf>> (last accessed 28 December 2020).

46 The OAU Refugee Convention was finally expressed to be complementary to the UN Refugee Convention. Art 8(1) states that the convention “shall be the effective regional complement in Africa” to the UN Refugee Convention. This is reaffirmed in recital 9 of the preamble, which acknowledges that the UN Refugee Convention, as modified by the 1967 Protocol, “constitute[s] the basic and universal instrument relating to the status of refugees”. On the complementary nature of the OAU Refugee Convention to the UN Refugee Convention, see, for example, C Lewis *UNHCR and International Refugee Law: From Treaties to Innovation* (2012, Routledge Research in International Law) at 78–79; Viljoen “Africa’s contribution”, above at note 16 at 25–28; V Türk “The role of UNHCR in the development of international refugee law” in F Nicholson and P Twomey (eds) *Refugee Rights and Realities: Evolving International Concepts and Regimes* (1999, Cambridge University Press) 153 at 167.

instruments to address matters of particular concern to the refugee situation in their region and that reflect their interests.⁴⁷ Among the most significant contributions of these instruments are the expanded refugee definition, the recognition of the principle of *non-refoulement* in its widest sense, and the emphasis on the voluntary character of repatriation.⁴⁸ These contributions are not only reflected in the OAU Refugee Convention, but also in earlier supra-national instruments, particularly the Bangkok Principles. Against this background, this section provides a brief overview of a number of significant areas in which the stipulations adopted by these instruments can be considered to be unprecedented. In doing so, it illuminates the extent to which they have contributed to the development of refugee law in the region and beyond.

The Bangkok Principles on Status and Treatment of Refugees

The subject of refugee protection had been on the agenda of the AALCC since its sixth session, held in Cairo in 1964 following a reference made by the only African member of the AALCC at that time: the government of Egypt.⁴⁹ After a lengthy debate and discussion, the AALCC formulated a set of principles on the “Status and Treatment of Refugees”, commonly referred to as the Bangkok Principles, which were adopted unanimously by AALCC member states at its eighth session held in Bangkok in 1966.⁵⁰

Among the most important provisions of the Bangkok Principles is the one found in article III(3), which recognizes the applicability of the principle of *non-refoulement* in its widest sense. While this provision listed exceptions to the *non-refoulement* obligation for reasons of national security and safeguarding populations, it expanded the scope of the principle of *non-refoulement* found in the UN Refugee Convention by expressly granting protection against rejection at a frontier. This provision may be viewed as a precursor to the inclusion of the principle of *non-refoulement* in its widest sense in both the OAU Refugee Convention⁵¹ and a universal instrument, namely the 1967 UN Declaration on Territorial Asylum.⁵² The latter instrument similarly included among its provisions the prohibition of rejection at the frontier where the

47 See A Onayemi and O Elias “Aspects of Africa’s contribution to the development of international law” in C Jalloh and O Elias (eds) *Shielding Humanity: Essays in International Law in Honour of Judge Abdul G Koroma* (2015, Brill) 591.

48 See, for example, R Hofmann “Refugee law in the African context” (1992) 52 *Heidelberg Journal of International Law* 318 at 328.

49 “Status and treatment of refugees”, above at note 4 at 1.

50 S Sucharitkul “Contribution of the Asian-African Legal Consultative Organization to the codification and progressive development of international law” in *Essays in International Law* (2007, AALCO) 9 at 16.

51 The OAU Refugee Convention, art 2(3) is the first supranational provision to give expression in binding form to the applicability of the principle of *non-refoulement* in this widest sense.

52 See Declaration on Territorial Asylum, 1967, art 3(1).

individual “may be subjected to persecution”.⁵³ Although neither the principles nor the declaration are legally binding, since their adoption, the unification of the extraterritorial application of *non-refoulement* has led to the (contested)⁵⁴ establishment of new customary rules of international law, creating new obligations for states.⁵⁵

Following recommendations of the Manila Seminar in 1996⁵⁶ and the Tehran Meeting of Experts in 1998,⁵⁷ AALCC member states decided to re-examine the Bangkok Principles in view of developments in law and practice in Africa and Asia since the adoption of the principles in 1966. The Bangkok Principles were revised at the AALCC's 39th session in 2000,⁵⁸ with the revised version (2001 Bangkok Principles) finally adopted at its 40th session on 24 June 2001 in New Delhi.⁵⁹ The 2001 Bangkok Principles were the result of, inter alia, consultations with UNHCR as well as comments submitted by individual AALCC member states during inter-sessional consultations between 1997 and 1999.⁶⁰ Some member states proposed specific amendments to the refugee definition, suggesting an expanded definition in light of other

53 Ibid. See Sucharitkul “Contribution of the Asian-African Legal Consultative”, above at note 50 at 16.

54 Among the very few legal writers who do not agree with this is JC Hathaway *The Rights of Refugees under International Law* (2010, Cambridge University Press) at 363–70.

55 This, as explicitly stated by the drafters of the UN Declaration on Territorial Asylum, was their will. See G Goodwin-Gill “The 1967 Declaration on Territorial Asylum” (2012) *United Nations Audiovisual Library of International Law* 1 at 6, citing A/6912 (1967) (a report of the sixth committee of the General Assembly that considered the Draft Declaration on Territorial Asylum). The extraterritorial application of *non-refoulement* has been consolidated through the case law of regional courts and human rights bodies. See, for example: *Hirsi Jamaa and Others v Italy* appln no 27765/09, judgment of 23 February 2012; *JHA v Spain* CAT/C/41/D/323/2007, 21 November 2008; *The Haitian Center for Human Rights et al v United States* (decision) Inter-American Commission on Human Rights, C No 10.675 (13 March 1997), paras 163 and 182; *Delia Saldías de López v Uruguay* CCPR/C/13/D/52/1979, 29 July 1981, para 12.2.

56 This seminar was held in Manila on 11–13 December 1996. Among other items, delegates decided to re-examine the Bangkok Principles in the light of developments in law and practice in the Afro-Asian region since 1966: “Status and treatment of refugees”, above at note 4 at 1.

57 This meeting was held in Tehran on 11–12 March 1998 to discuss “the need to reconcile the fundamental interests of states and the humanitarian obligations of states to protect refugees”: “Status and treatment of refugees”, id at 1–2.

58 Sucharitkul “Contribution of the Asian-African Legal Consultative”, above at note 50 at 16.

59 Ibid.

60 “Status and treatment of refugees”, above at note 4 at 10. See also “Final text of the AALCO's 1966 Bangkok Principles on Status and Treatment of Refugees: As adopted on 24 June 2001 at the AALCO'S 40th session, New Delhi”, available at: <<https://www.refworld.org/docid/3de5f2d52.html>> (<http://www.refworld.org/docid/3de5f2d52.html>) (last accessed 28 December 2020).

regional and international instruments, particularly the OAU Refugee Convention.⁶¹

For instance, Ghana's delegate proposed a broader refugee definition that included persons fleeing generalized violence or massive violations of human rights.⁶² Uganda's delegate proposed expanding the definition of refugees to cover those persecuted on the ground of "colour".⁶³ The latter proposal found recognition in article I(1), which, apart from the five grounds listed in article 1A(2) of the UN Refugee Convention and article 1(1) of the OAU Refugee Convention, also includes the grounds of colour, ethnic origin and gender.⁶⁴ Moreover, the 2001 Bangkok Principles set forth an extended refugee definition, similar to that in the OAU Refugee Convention. Indeed, article I(2) made the term "refugee" also applicable to individuals forced to leave their place of habitual residence "owing to external occupation, foreign domination or events seriously disturbing public order". The addition of the OAU Refugee Convention was recommended both at the Manila Seminar and the Tehran Meeting of Experts.⁶⁵ The OAU Refugee Convention also influenced the inclusion and amendment of other provisions of the 2001 Bangkok Principles, in particular the provisions contained in: article I(7) on exclusion clauses,⁶⁶ article II(3) on the right to asylum;⁶⁷ article IV(5) on the principle of non-discrimination;⁶⁸ article VII on voluntary repatriation;⁶⁹ and article VIII on co-operation with international organizations.⁷⁰ It should be emphasized that the 2001 Bangkok Principles further contained the far-reaching right to

61 Ibid.

62 Ghana's proposed refugee definition read: "A refugee is a person who ... [i]s outside the country of his nationality and is unwilling or cannot, for the time being, return to his home country because his life, freedom or personal security would be at risk there; the risk emanating from a pattern of persecution on account of race, religion, nationality, membership of a particular social group or political opinion and / or from *generalized violence (international war, internal armed conflict, foreign aggression or occupation, severe disruption of public order) or from massive violations of human rights* in the whole or part of the country of nationality" (emphasis added); "Status and treatment of refugees", above at note 4 at 23–24.

63 Id at 24.

64 Ibid.

65 See id at 12, footnote 19.

66 The phrase "as defined in international instruments drawn up to make provisions in respect of such crimes" (which derives from the OAU Refugee Convention, art 1(5)(a)) was added to the 2001 Bangkok Principles, art I(7): id at 14, footnotes 19 and 20.

67 Art II(3) derives from the OAU Refugee Convention, art 2(2) and the UN Declaration on Territorial Asylum, preamble. It reads: "The grant of asylum to refugees is a peaceful and humanitarian act": id at 15, footnote 24.

68 Art IV(5) derives partially from: the OAU Refugee Convention, art 4; the UN Refugee Convention, art 3; and the Manila Seminar, recommendation (d): id at 16, footnote 37.

69 Art VII was a new addition to the 2001 Bangkok Principles taken from the OAU Refugee Convention: id at 20, footnote 60.

70 Art VIII derives from: the OAU Refugee Convention, art 8(1); the UN Refugee Convention, art 35; and the 1967 Protocol, art 2: id at 23, footnote 81.

compensation from the country of origin that the refugee left or to which he or she is unable to return, which appears to be inspired by the historical cases of compensation and restitution from Germany and Uganda.⁷¹

OAU Convention Governing the Specific Aspects of Refugee Problems in Africa

The OAU Refugee Convention reproduces, in substance, the provisions of the UN Refugee Convention and its subsequent 1967 Protocol. However, it also incorporates significant developments, some of which were referred to in the previous section of this article. First, it specifically reaffirms the importance of the institution of asylum,⁷² the exercise of which is defined as a “peaceful and humanitarian act”.⁷³ Secondly, it increases the scope of protection by extending the protection against *refoulement* to encompass frontiers.⁷⁴ It also expands on the 1951 definition of refugee to include those “compelled to leave ... owing to external aggression, occupation, foreign domination, or events seriously disturbing the public order”.⁷⁵ In contrast to the refugee definition in the UN Refugee Convention, the OAU definition of refugee in article 1(2) does not speak of the subjective fear of the individual but reflects objective criteria. Despite suggestions to the contrary,⁷⁶ most commentators, including

71 Id at 19, footnote 56. On this topic see LT Lee “The right to compensation: Refugees and countries of asylum” (1986) 80 *American Journal of International Law* 532; International Law Association “Report of the sixty-fifth conference held at Cairo, Egypt 21 to 26 April 1992” (Cairo, 1993).

72 Art 11(1) states: “Member States of the OAU shall use their best endeavours consistent with their respective legislation to receive refugees”. While this wording does not imply the right to be granted asylum, this provision is supported by the African Charter, art 12(3), which states that, “every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions” (emphasis added). On the right to seek and obtain asylum, see, for example, C Beyani *Protection of the Right to Seek and Obtain Asylum under the African Human Rights System* (2013, Martinus Nijhoff).

73 OAU Refugee Convention, art 11(2).

74 Id, art 2(3).

75 Id, art 1(2). It has been suggested that “events seriously disturbing or disrupting public order” also includes any man-made event, including armed conflicts. See Sharpe’s reference to the opinions of Edwards et al in Sharpe *The Regional Law*, above at note 39 at 49–50. See also JC Hathaway *The Law of Refugee Status* (1991, Butterworths) at 16–19; Arboleda “Refugee definition”, above at note 38 at 194; and UNHCR “Protection mechanisms outside of the 1951 Convention (‘complementary protection’)” (June 2005), UN doc PPLA/2005/02 at 45, footnote 145. However, the OAU Refugee Convention, art 1 adds further grounds for exclusion from refugee status and cessation of refugee status to those stipulated by the UN Refugee Convention, thereby narrowing the scope of the broader refugee definition.

76 Edwards moves away from this rather settled opinion by arguing that the OAU definition of refugee “is framed in terms of individual status”, which thus “necessitates inquiring into the individual or subjective reasons for flight of each applicant”: A Edwards “Refugee status determination in Africa” (2006) 14 *African Journal of International & Comparative Law* 204 at 228–30. A 2015 judicial review by Sharpe of South Africa’s High

Opoku-Awuku, Rwelamira, Oloka-Onyango and Arboleda, maintain that the words “compelled to leave” require an objective inquiry into the nature of the conditions in the country of origin.⁷⁷ This interpretation, in turn, has led to the (contested) argument that the OAU refugee definition explicitly sets forth the legal basis for accepting “mass” influxes (resulting from, for example, armed conflicts) upon determination of the status of a “group”.⁷⁸ In Rutinwa’s view, the “qualities” of the OAU extended definition lie not in its wider scope but in defining a refugee in such terms that would make it easier to determine if an individual qualifies as a refugee.⁷⁹ Thirdly, the OAU Refugee Convention includes, among the provisions regulating durable solutions, respect for the voluntary character of repatriation.⁸⁰ These

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Court shows that, in determining whether an individual qualifies as a refugee under South Africa’s equivalent of the OAU Refugee Convention, art 1(2), the test employed is “predominantly objective in character” but also demands an assessment of the individual’s personal circumstances. Sharpe’s overall assessment of the meaning of the terms “compelled to leave” calls into question the sufficiency of determining refugee status on a purely objective basis. See Sharpe *The Regional Law*, above at note 39 at 55–60.

- 77 MR Rwelamira “Two decades of the 1969 OAU Convention on the Specific Aspects of Refugee Problems in Africa” (1989) 1/4 *International Journal of Refugee Law* 557 at 558; E Opoku-Awuku “Refugee movements in Africa and the OAU Convention on Refugees” (1995) 39/1 *Journal of African Law* 79 at 81; E Arboleda “The Cartagena Declaration of 1984 and its similarities to the 1969 OAU Convention: A comparative perspective” (1995) *International Journal of Refugee Law* 87 at 94; J Oloka-Onyango “Human rights, the OAU Convention and the refugee crisis in Africa: Forty years after Geneva” (1991) 3 *International Journal of Refugee Law* 453 at 455. See also J Turner “Liberian refugees: A test of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa” (1994) 8 *Georgetown Immigration Law Journal* 281 at 285.
- 78 P Nobel “Refugees, law, and development in Africa” (1982) 3/1 *Michigan Journal of International Law* 255 at 262; Rwelamira “Two decades”, id at 559. See also Sharpe *The Regional Law*, above at note 39 at 59–60. In contrast to this view, Edwards argues that the OAU Refugee Convention does not provide a mechanism for group determination of refugee status. While she identifies that group or prima facie recognition has been the approach of most African governments to refugee situations in Africa, she argues that such ability “has been wrongly derived from the OAU Convention”: Edwards “Refugee status determination”, above at note 76 at 228.
- 79 B Rutinwa “Relationship between the 1951 Refugee Convention and the 1969 OAU Convention on Refugees” in V Türk, A Edwards and C Wouters (eds) *In Flight from Conflict and Violence: UNHCR’s Consultations on Refugee Status and Other Forms of International Protection* (2017, Cambridge University Press) 94 at 115. Yet, while the UN Refugee Convention contains no provisions regarding “mass” influx, Durieux, McAdam and Jackson are of the opinion that this does not mean that the UN Refugee Convention is not applicable in cases of large-scale displacement. See IC Jackson *The Refugee Concept in Group Situations* (1999, Martinus Nijhoff); JF Durieux and J McAdam “Non-refoulement through time: The case for a derogation clause to the Refugee Convention in mass influx emergencies” (2004) 16/1 *International Journal of Refugee Law* 4 at 9. See also Sharpe *The Regional Law*, above at note 39 at 66–67.
- 80 OAU Refugee Convention, art 5. UNHCR “Issues and challenges in international protection in Africa” (1995) 7 *International Journal of Refugee Law* 55 at 58.

developments have been the subject of extensive scholarly debate, so a deeper analysis of them need not detain us.⁸¹ Rather, this section focuses on the OAU Refugee Convention's global influence and contribution to the progressive development of international refugee law.

Apart from its impact on the 2001 Bangkok Principles,⁸² the influence of the OAU Refugee Convention is also apparent in other international and regional instruments. For instance, the OAU Refugee Convention has informed the scope of UNHCR's mandate and its "concept of persons in need of international protection".⁸³ Indeed, UNHCR extended its mandate to cover persons who do not fall within the terms of the UN Refugee Convention or the UNHCR Statute but who nevertheless are in need of international protection, including individuals fleeing armed conflict or serious and generalized disorder and violence.⁸⁴ Furthermore, the concept of serious public disorder in UNHCR's formulation is drawn from the language found in the OAU refugee definition.⁸⁵ In a 1991 report of its Working Group on Solutions and Protection, the ExCom recommended that, "[t]he question of a possible application on a global basis of a refugee definition applicable to persons not protected by the UN Refugee Convention / 1967 Protocol or by regional instruments could be considered further".⁸⁶ Among the groups identified in the report were persons forced to leave or prevented from returning because of "man-made disasters", "natural or ecological disaster" or "extreme

81 See, for example, Sharpe *The Regional Law*, above at note 39 at 34–83; J van Garderen and J Ebenstein "Background, regional developments: Africa" in Zimmermann (ed) 1951 *Convention*, above at note 6, 186; Rankin "Extending the limits", above at note 34; A Tuepker "On the threshold of Africa: OAU and UN definitions in South African asylum practice" (2002) 15/4 *Journal of Refugee Studies* 409; G Okoth-Obbo "30 Years On: A legal perspective of the 1969 OAU Convention Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa" (2001) 20/1 *Refugee Survey Quarterly* 81; UNHCR "Issues and challenges", above at note 80; Hofmann "Refugee law", above at note 48; Arboleda "Refugee definition", above at note 38; Rwelamira "Two decades", above at note 77; Nobel "Refugees, law, and development", above at note 78.

82 The Bangkok Principles are of little significance in terms of the legal obligations placed on African states, as most of them are parties to the OAU Refugee Convention. Yet, their relevance lies in their "role" in Asia, where very few states are contracting parties to the UN Refugee Convention and / or 1967 Protocol.

83 UNHCR "Protection mechanisms outside", above at note 75 at 12.

84 "Note on international protection (submitted by the High Commissioner)" (UNHCR, 31 July 1981), UN doc A/AC.96/593, available at: <<https://www.refworld.org/docid/3ae68bff10.html>> (last accessed 28 December 2020); "UNHCR and international protection: A protection induction programme" (UNHCR, 30 June 2006) at 22. See also Sharpe *The Regional Law*, above at note 39 at 37; Lewis *UNHCR and International Refugee Law*, above at note 46 at 127; G Goodwin-Gill *The Refugee in International Law* (2nd ed, 1996, Clarendon) at 8–18.

85 UNHCR "Protection mechanisms outside", above at note 75 at 44.

86 "Report of the Working Group on Solutions and Protection to the 42nd session of the Executive Committee of the High Commissioner's programme" (UNHCR, 12 August 1991), UN doc EC/SCP/64, para 55(c).

poverty".⁸⁷ There was also an exchange of views as to whether the respective definitions of a refugee in the OAU Refugee Convention and the 1984 Cartagena Declaration on Refugees (Cartagena Declaration)⁸⁸ could be included in an additional protocol to the UN Refugee Convention or, as a first step, in a UN General Assembly (GA) resolution.⁸⁹ There was, however, no unanimity on the need for making these regional definitions universal.⁹⁰ Later, in 1994, to clarify the scope of UNHCR's mandate, the High Commissioner at that time explained that the office had adopted the "usage of regional instruments such as the OAU Refugee Convention and the Cartagena Declaration, using the term 'refugee' in the broader sense".⁹¹ Presently, when UNHCR conducts refugee status determination pursuant to its mandate, it considers as refugees not only those who meet the UN Refugee Convention definition, but also individuals covered by the OAU Refugee Convention.⁹²

Further, ExCom's Conclusion No 22 of 21 October 1981 noted that the fundamental "principle of *non-refoulement* - including non-rejection at the frontier - must be scrupulously observed".⁹³ Although without attribution, this wording clearly mirrors the language of article 2(3) of the OAU Refugee Convention. While ExCom conclusions are not legally binding, they are generally accepted as constituting "soft law", which aids in the interpretation and application of refugee legal instruments.⁹⁴

Beyond UNHCR, the contribution of the OAU Refugee Convention has been affirmed in, for example, GA resolution 54/147 of 22 February 2000 on

87 Id, paras 32–35.

88 Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection on Refugees in Central America, Mexico, and Panama, held in Cartagena, 19–22 November 1984.

89 "Report of the Working Group", above at note 86, para 25.

90 Ibid.

91 Sharpe *The Regional Law*, above at note 39 at 37–38.

92 Id at 38.

93 "Protection of asylum-seekers in situations of large-scale influx: No 22 (XXXII) - 1981" (ExCom, 21 October 1981), UN doc A/36/12/Add.1, sec II, para 2, available at: <<https://www.unhcr.org/excom/exconc/3ae68c6e10/protection-asylum-seekers-situations-large-scale-influx.html>> (last accessed 28 December 2020). See also: ExCom Conclusion No 6 (XXVIII) reaffirming "the fundamental importance of the observance of the principle of non-refoulement - both at the border and within the territory of a State"; and ExCom Conclusion No 15 (XXX), stating: "It is the humanitarian obligation of all coastal States to allow vessels in distress to seek haven in their waters and to grant asylum, or at least temporary refuge, to persons on board wishing to seek asylum."

94 UNHCR's approach to some aspects of international refugee law (such as the extraterritorial application of the principle of *non-refoulement*) has been consolidated through the case law of courts around the world. Its approach to this topic, which drew from the OAU Refugee Convention and is further based on state practice and jurisprudence worldwide, provides evidence of a customary rule. See Corkery "The contribution of the UNHCR", above at note 42 at 118–19.

assistance to refugees, returnees and displaced persons in Africa.⁹⁵ On the 50th anniversary the UN Refugee Convention, a Declaration of States Parties was adopted unanimously in 2001, which emphasized the importance of the OAU Refugee Convention.⁹⁶ A reference to this regional refugee protection instrument is also found in the New York Declaration for Refugees and Migrants adopted in 2016.⁹⁷

The OAU Refugee Convention has further contributed to the development of specific aspects of other regional instruments. Refugee law scholarship strongly suggests that the Cartagena Declaration drew inspiration from the OAU Refugee Convention.⁹⁸ This is reflected in the negotiations leading to the Cartagena Declaration and in the final text itself. In 1981, a colloquium on the subject of “Asylum and the International Protection of Refugees” was held in Mexico under the auspices of UNHCR. ExCom Conclusion No 4 specified the need for a “more encompassing refugee definition” to deal with the most immediate consequences presented by the regional crisis in Central America.⁹⁹ In addition to the individuals falling within the definition of “the 1951 Convention and the 1967 Protocol”, the Cartagena Declaration includes among refugees: “persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order”.¹⁰⁰

In the words of Eduardo Arboleda, former legal adviser at UNHCR Canada, this definition “basically reiterated the language of the 1969 OAU Convention and added ‘massive violations of human rights’ to the conditions defining a refugee”.¹⁰¹ The declaration itself expressly refers to the “precedent” of article 1(2) of the OAU Refugee Convention and to the doctrine of the Inter-American Commission on Human Rights as inspiring the language in

95 UNHCR “Protection mechanisms outside”, above at note 75 at 14–15.

96 Declaration of States Parties to the 1951 Convention and / or Its 1967 Protocol Relating to the Status of Refugees (Geneva, 13 December 2001) in “Report of the ministerial meeting of states parties to the 1951 Convention and / or its 1967 Protocol Relating to the Status of Refugees (Geneva, 12–13 December 2001), UN doc HCR/MMSF/2001/10”, preamble, recital 2.

97 New York Declaration for Refugees and Migrants (GA res, 3 October 2016), A/RES/71/1.

98 See, for example, S Kneebone and F Rawlings-Sanaei “Regionalism as a response to a global challenge” in S Kneebone and F Rawlings-Sanaei (eds) *New Regionalism and Asylum-Seekers: Challenges Ahead* (2007, Berghahn Books) 1 at 8; Arboleda “Refugee definition”, above at note 38 at 202; Arboleda “The Cartagena Declaration”, above at note 77. This view is also shared by UNHCR: “Guidelines on international protection No 12: Claims for refugee status related to situations of armed conflict and violence under article 1A(2) of the 1951 Convention and / or 1967 Protocol Relating to the Status of Refugees and the regional refugee definitions” (UNHCR, 2 December 2016), UN doc HCR/GIP/16/12 at 13.

99 Arboleda “Refugee definition”, above at note 38 at 206.

100 Cartagena Declaration, art III(3).

101 Arboleda “Refugee definition”, above at note 38 at 202.

its refugee definition. ExCom Conclusion III(3) states: "it is necessary to consider enlarging the concept of a refugee, bearing in mind, as far as appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention (article 1, paragraph 2) and the doctrine employed in the reports of the Inter-American Commission on Human Rights".¹⁰² This in turn reflects that the OAU Refugee Convention was a direct inspiration for the Cartagena Declaration's refugee definition. While the regional declaration is not binding, 13 Latin American states have incorporated its provisions into their domestic legislation. Interestingly, Belize decided to incorporate the OAU refugee definition instead of the one contained in the Cartagena Declaration into its Refugees Act of 1991.¹⁰³

Similarly, article 1(2) of the OAU Refugee Convention influenced the way in which refugees are defined in the League of Arab States' Arab Convention on Regulating Status of Refugees (not yet in force) in Arab countries. In addition to the UN Refugee Convention definition, this definition also considers as refugees individuals who "unwillingly [take] refuge ... because of sustained aggression against, occupation and foreign domination of such country or because of the occurrence of natural disasters or grave events resulting in major disruption of public order in the whole country or any part thereof".¹⁰⁴

In contrast, the European Union (EU), through the adoption of supranational legislation (namely the Qualification Directive of 29 April 2004), designated a subsidiary regime for certain individuals who do not qualify for refugee status under the UN Refugee Convention (as amended by the 1967 Protocol) but who do, however, fall under the protection of *non-refoulement*.¹⁰⁵ During the drafting process of the directive, reference was made to, inter alia, the evolution of UNHCR's mandate (which, as explained above, was partly informed by the OAU Refugee Convention) and regional developments such as the OAU Refugee Convention and the Cartagena Declaration, as arguments for including "people threatened by indiscriminate violence and massive human rights violations" within the protection regime.¹⁰⁶ The European Commission initially considered the option of having a "single status

102 In the words of Eduardo Arboleda, former legal adviser at UNHCR Canada, "this conclusion basically reiterated the language of the 1969 OAU Convention and added 'massive violations of human rights' to the conditions defining a refugee": *ibid*.

103 Now the Refugees Act of 2000 (Belize), chap 165 (31 December 2000), art 4(1)(c). See also Sharpe *The Regional Law*, above at note 39 at 36–37; Arboleda "The Cartagena Declaration", above at note 77 at 98.

104 Sharpe, *id* at 37.

105 Art 2(f) of Directive 2011/95/EU (previously Directive 2004/83/EC) on Standards for the Qualification of Third Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (recast) [2011] OJ L 337/9 (Recast Qualification Directive).

106 "UNHCR statement on subsidiary protection under the EC Qualification Directive for People Threatened by Indiscriminate Violence" (UNHCR, January 2008) at 14, available at: <<https://www.refworld.org/pdfid/479df7472.pdf>> (last accessed 28 December 2020).

conferring the same types of rights” recognized under the UN Refugee Convention.¹⁰⁷ Later in the drafting process, it opted to codify two separate statuses: refugee status and subsidiary protection.¹⁰⁸ The latter is granted to individuals who do not qualify for refugee status but who “would face a real risk of suffering serious harm”.¹⁰⁹ However, it does not bring all the guarantees of refugee status.¹¹⁰ The Qualification Directive indeed allows EU member states to grant fewer rights, both in terms of quantity and quality, to subsidiary protection beneficiaries.¹¹¹ Importantly, the concepts employed in defining “serious harm” in article 15(c) of the Qualification Directive are similar to those used in the OAU Refugee Convention and the Cartagena Declaration, to the extent that these relate to situations of indiscriminate violence. In particular, this provision states that serious harm consists of a “serious and individual threat to a civilian’s life or person by reason of *indiscriminate* ...”.¹¹² Under article 15(a)(b), “serious harm” also includes “the death penalty or execution” and “torture or inhuman or degrading treatment or punishment”. While the first two paragraphs reflect EU member states’ human rights obligations under regional and international human rights instruments,¹¹³ in Mandal’s words, the third “cannot be traced to language found in a specific universal or regional human rights instrument”.¹¹⁴ Instead, it reflects more the concepts found in the OAU Refugee Convention and the Cartagena Declaration.¹¹⁵

107 European Commission “Communication from the Commission to the Council and the European Parliament towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum” (20 November 2000), COM/2000/0755 final, para 3.2.3.

108 Ibid. See also MT Gill Gazo “Refugee protection under international human rights law: From *non-refoulement* to residence and citizenship” (2015) 34 *Refugee Survey Quarterly* 11 at 26.

109 Recast Qualification Directive, above at note 105, art 2(f).

110 For a discussion on this, see, for example, C Bauloz and G Ruiz “Refugee status and subsidiary protection: Towards a uniform concept of international protection?” in V Chetail et al (eds) *Reforming the Common European Asylum System* (2016, Brill) 240.

111 See Recast Qualification Directive, above at note 105, chap VII. On that basis, many EU states have opted to subject holders of subsidiary protection to less preferential treatment than holders of refugee status.

112 Emphasis added.

113 Namely: the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, and its Protocol No 6 Concerning the Abolition of the Death Penalty, 1983; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; and the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, 1989.

114 UNHCR “Protection mechanisms outside”, above at note 75 at 18.

115 Ibid. McAdam notes that the words “indiscriminate violence” in article 15(c) reflect “in part Member States’ obligations under the Temporary Protection Directive ... as well as EU Member States’ repeated support for UNHCR’s mandate activities for victims of indiscriminate violence (linked to other regional agreements such as the OAU Convention and the Cartagena Declaration”: J McAdam *Complementary Protection in International Refugee Law* (2007, Oxford University Press) at 71.

It therefore appears clear that Africa's contributions to the codification of regional norms in the area of refugee protection have influenced subsequent legal developments beyond the confines of Africa. Moreover, some of the provisions of the OAU Refugee Convention may provide evidence of customary rules of international law,¹¹⁶ which have to be taken into account when interpreting and applying other international and regional legal instruments in this field of law. In the words of Pinto de Albuquerque, a judge of the European Court of Human Rights, "international refugee law has evolved by assimilating broader human rights standard[s] and thus enlarging the Convention concept of refugee ... to other individuals who are in need of complementary international protection" as covered *inter alia* by articles 1 and 2 of the OAU Refugee Convention.¹¹⁷

AFRICAN HUMAN RIGHTS SYSTEM: ITS (PROGRESSIVE) APPROACH AND CONTRIBUTION TO INTERNATIONAL REFUGEE LAW

The OAU Refugee Convention constitutes "the first treaty with a human rights focus" adopted under the umbrella of the OAU.¹¹⁸ While the title does not speak of human rights, its provisions create subjective rights and impose duties on state parties.¹¹⁹ For instance, the OAU Refugee Convention is explicit about the duty of OAU member states "to use their best endeavours ... to receive refugees".¹²⁰ Moreover, during the Pan-African Conference on Refugees held in Arusha, Tanzania in May 1979 (commonly referred to as the Arusha Conference), delegates confirmed that refugee law is part of human rights in the broader sense.¹²¹

In addition to the OAU Refugee Convention, other human rights instruments have been adopted under the auspices of the African Union and its predecessor, the OAU, which have further elaborated upon the rights of refugees and asylum-seekers in Africa.¹²² Importantly, the African Charter, which was

116 See DJ Cantor and F Chikwanha "Reconsidering African refugee law" (2019) 31/2–3 *International Journal of Refugee Law* 182 at 245, arguing that widely adopted rules in African national refugee laws "have the potential to contribute to customary formation at the global level".

117 Hirsī Jamaa, above at note 55, concurring opinion of Judge Pinto de Albuquerque.

118 G Bekker "The protection of asylum seekers and refugees within the African regional human rights system" (2013) 13 *African Human Rights Law Journal* 1 at 1.

119 On this approach, see *LaGrand, Germany v United States of America*, ICJ judgment of 27 June 2001.

120 OAU Refugee Convention, art 2(1). In contrast to this view, Weis claims that this requirement is recommendatory, rather than binding on states: Weis "The Convention of the Organisation", above at note 34 at 457.

121 The conference was attended by 39 OAU member states: Nobel "Refugees, law, and development", above at note 78 at 262.

122 For a brief study of the current legal framework for the promotion and protection of

adopted in 1981, recognizes the right “to seek and obtain asylum”.¹²³ It also provided for the creation of the African Commission on Human and Peoples’ Rights (African Commission) to oversee the implementation of the African Charter.¹²⁴ Additionally, the 1998 Protocol to the African Charter on the Establishment of an African Court on Human and Peoples’ Rights, established the African Court on Human and Peoples’ Rights (African Court) in order to “complement” the protective mandate of the African Commission.¹²⁵ Pursuant to this protocol, the African Court has jurisdiction to deal with all cases and disputes submitted to it regarding the interpretation and application of the African Charter and any other relevant human rights instrument ratified by the concerned states,¹²⁶ as well as jurisdiction to provide an opinion on any legal matter relating to these instruments.¹²⁷ Another major addition to the African human rights system was the African Charter on the Rights and Welfare of the Child (African Children’s Charter), adopted in 1990, which provides special protection measures for refugee children and internally displaced children.¹²⁸ It also created the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) to oversee its implementation.¹²⁹ Lastly, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (African Women’s Protocol) was adopted in 2003. This instrument also includes special protection measures for refugee women,¹³⁰ and entrusted its supervision to the African Commission and African Court.¹³¹

The following sections of this article take a non-exhaustive look at some of the authoritative pronouncements made by the African Commission and African Court in relation to the rights of asylum-seekers and refugees within the African human rights system, in so far as they adopt a progressive approach to the interpretation of their rights.¹³²

African Commission on Human and Peoples’ Rights

Recourse to the African Commission enables refugees and asylum-seekers to bring claims against the host country where refugee law is inadequate or

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human rights in Africa, see Bekker “The protection of asylum seekers”, above note at 118 at 3–7.

123 African Charter, art 12(3).

124 See *id.*, art 2.

125 Protocol to the African Charter on the Establishment of an African Court on Human and Peoples’ Rights, 1998, art 8.

126 *Id.*, art 3.

127 *Id.*, art 4.

128 African Children’s Charter, art 23.

129 *Id.*, chap II.

130 African Women’s Protocol, arts 4(2)(k), 10(2)(c)(d) and 11(3).

131 *Id.*, arts 26 and 27.

132 For a comprehensive analysis of this jurisprudence up to 2013, see Bekker “The protection of asylum seekers”, above note at 118 at 9–29.

not respected. Moreover, the commission, in the case of *Rencontre Africaine Pour la Defense des Droits de l'Homme v Zambia*, reasoned that recourse to the African Commission applies to non-nationals.¹³³ Importantly, the African Commission has allowed claims against countries of origin on the basis of *continuing* violations of their rights based on persecution and flight to other states.¹³⁴

Of particular note is the African Commission's approach towards the interpretation of article 5 of the African Charter on the right to respect of dignity,¹³⁵ in so far as it has interpreted this provision to include guarantees of social and economic rights. For instance, in *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, the African Commission elaborated on the state obligations in instances of voluntary repatriation. In doing so, the African Commission required states to adopt all necessary measures to ensure protection, including "economic and social infrastructure, such as education, health, water, and agricultural services", in order to provide "conditions for return in safety and *dignity*" for internally displaced persons and refugees.¹³⁶ In the absence of an express provision regulating the right to housing within the African Charter, the African Commission has interpreted the provisions on human dignity and the prohibition of torture, cruel, inhuman and degrading treatment as encompassing such a guarantee. In *The Nubian Community in Kenya v Kenya*, the African Commission held that the rights to "citizenship or nationality as a legal status is protected under Article 5 of the [African Charter]".¹³⁷

In situations of expulsion or deportation, the African Commission considered that, "it is unacceptable to deport individuals without giving them the possibility to plead their case before the competent national courts as this is contrary to the spirit and letter of the [African Charter] and international law".¹³⁸ It has also maintained consistently that the guarantees of due process must be applied in the context of proceedings on the expulsion of refugees.¹³⁹

133 Comm no 71/92, October 1996, para 52.

134 Comm no 232/99, *John D Ouko v Kenya*, 2000, para 144 (emphasis added). The African Commission, by linking the claimant's refugee status to the exhaustion of domestic remedies requirement, held that, "the complainant is unable to pursue any domestic remedy following his flight to the Democratic Republic of Congo (DRC) for fear of his life, and his subsequent recognition as a refugee by the Office of the United Nations High Commissioner for Refugees": id, para 19.

135 African Charter, art 5 states: "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."

136 Comm no 279/03-296/05, 16–17 May 2019, para 229(5) (emphasis added).

137 Comm no 317/06, 30 May 2006.

138 Comm no 159/96, 22nd ordinary session, 11 November 1997, para 20.

139 Comm no 313/05, *Kenneth Good v Botswana*, 47th ordinary session, 12–26 May 2010, paras 160–80; comm nos 27/89, 46/91, 49/91 and 99/93, *Organisation Mondiale Contre la Torture and Association Internationale des Juristes Democrates, Commission Internationale des Juristes*

Notably, in the case of *Familia Pacheco Tineo v Bolivia*, the Inter-American Court of Human Rights endorsed these pronouncements, thereby determining that, “in proceedings such as those that may result in the expulsion or deportation of aliens” the guarantees of due process continue to apply.¹⁴⁰

Most recently, in its General Comment No 5 (2019), the African Commission elaborated on the right to freedom of movement and residence. The African Commission emphasized that this applies to every individual, including refugees, asylum-seekers, internally displaced persons and undocumented migrants.¹⁴¹ This is in line with the African Commission’s earlier position that the guarantee of non-discrimination in article 2 extends the protection afforded by the wider set of rights in the African Charter to everyone within the jurisdiction of member states, ie nationals as well as non-nationals.¹⁴² It went on to reason that the right to move freely within a state not only “encompasses the prerogative to move around within a state without arbitrary confinement of movement” but also “imposes a duty on the state not to interfere with the enjoyment of the free movement of individuals”.¹⁴³ In doing so, it emphasized that it is “crucial” that states afford “the same standard of protection” to asylum-seekers.¹⁴⁴ The African Commission further argued that this right intersects with several other rights, including the right to liberty protected under article 6 of the African Charter,¹⁴⁵ and that it should be treated as essential to human life.¹⁴⁶

African Court on Human and Peoples’ Rights

The African Court, together with the EU Court of Justice and the Inter-American Court of Human Rights, are the only supranational tribunals that could interpret the provisions of the UN Refugee Convention and its 1967 Protocol.¹⁴⁷ Indeed, these tribunals supervise regional human rights instruments that make explicit reference to the UN Refugee Convention.¹⁴⁸

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(CIJ), *Union Interafricaine des Droits de l’Homme v Rwanda*, 20th ordinary session, 21–31 October 1996, para 4.

140 Judgment, 2013, series C no 272, para 132.

141 General Comment No 5 on the African Charter on Human and Peoples’ Rights: The Right to Freedom of Movement and Residence (Article 12(1)) (2019) at 7.

142 Comm no 71/92, above at note 133.

143 General Comment No 5, above at note 141 at 3.

144 Ibid.

145 Ibid.

146 Id at 60.

147 See, for example, H Lambert “Introduction: European refugee law and transitional emulation” in H Lambert, J McAdam and M Fuellerton (eds) *The Global Reach of European Refugee Law* (2013, Cambridge University Press) 1 at 18.

148 While the American Convention on Human Rights, 1969, does not make explicit reference to the UN Refugee Convention, its art 22(7) states that “every person has the right to seek and be granted asylum in a foreign territory, in accordance with ... *international conventions*” (emphasis added).

Their jurisprudence, thus, is not only informative but also has a legal role in interpreting the UN Refugee Convention. They have the power to fill some of the gaps posed by this instrument. It should be recalled that there exists no specialized treaty body under the UN Refugee Convention that would be able to provide an authoritative interpretation of its terms.¹⁴⁹ While UNHCR, pursuant to article 35 of the UN Refugee Convention and the UNHCR Statute, has a “supervisory role” with respect to the UN Refugee Convention, it lacks binding force. To date, however, there is no case law from the African Court that examines the OAU Refugee Convention or the UN Refugee Convention.¹⁵⁰

In *Anudo Ochieng Anudo v Republic of Tanzania*, the African Court dealt for the first time with the right to nationality.¹⁵¹ While it does not directly address the rights of refugees and asylum-seekers, this case provides important guidance on issues of nationality and statelessness. In doing so, the court complemented earlier jurisprudence from the African Commission¹⁵² and the ACERWC.¹⁵³ First and foremost, the court went on to rule that the Universal Declaration of Human Rights (UDHR) is part of customary international law,¹⁵⁴ thereby holding that Tanzania had violated the applicant’s right not to be arbitrarily deprived of his nationality under the UDHR.¹⁵⁵ The African Court, however, missed the opportunity to endorse and further elaborate upon the African Commission’s position that “a claim to citizenship or nationality as a legal status is protected under Article 5 of the [African Charter]”.¹⁵⁶ Nonetheless, the assertion that the UDHR (and in particular the right to a nationality) is customary international law is, in the words of Bronwen Manby, a “welcome endorsement” that has been “often argued by human rights lawyers [rather] than accepted by states”.¹⁵⁷ The second and, according

149 See UN Refugee Convention, art 38, under which the only body competent to resolve disputes regarding the interpretation of the convention is the International Court of Justice, in the case of an inter-state dispute.

150 In its very first case of *Michelot Yogogombaye v Senegal* (in which the applicant requested inter alia that the African Court rule that Senegal had violated the African Charter and the OAU Refugee Convention), the African Court concluded that it did not have jurisdiction to hear the case as Senegal had “not accepted the jurisdiction of the Court to hear cases instituted directly against the country by individuals or non-governmental organizations”. In these circumstances, the court held that, pursuant to art 34(6) of its protocol, it did not have jurisdiction to hear the application. See appln 001/2008, *Michelot Yogogombaye v Senegal*, 15 December 2009, para 37.

151 Appln no 012/2015, 22 March 2018.

152 Comm no 317/06, above at note 137; comm no 97/93, *John K Modise v Botswana*, 6 November 2000.

153 *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v the Government of Kenya*, decision no 002/Com/002/2009, 22 March 2011.

154 Ibid.

155 Id, para 88.

156 Comm no 317/06, above at note 137; comm no 97/93, above at note 152.

157 B Manby “Case note: *Anudo Ochieng Anudo v Tanzania* (judgment) (African Court on

to most commentators, most important of the African Court's contribution to international law in this field, drawn from this judgment, relates to the burden of proof.¹⁵⁸ The African Court held that, in the context where an individual has previously been issued official documents recognizing nationality, the burden of proof lies on the state to prove the contrary (to the satisfaction of an independent tribunal).¹⁵⁹ Lastly, the court further reasoned that, even if the applicant were to be regarded as an alien by the respondent state, the state would still be bound by article 13 of the International Covenant on Civil and Political Rights, which protects foreigners from any form of arbitrary expulsion by providing them with legal guarantees.¹⁶⁰

Despite the willingness of the African Commission to bring cases to the African Court, most African states have not yet made a declaration recognizing the right to individual petitions set forth in article 34(6) of the African Court Protocol. This in turn has precluded the African Court from hearing cases brought before it.¹⁶¹

CONCLUSION

This article began by analysing the evolution of the refugee definition as it emerged in 1951, thereby unfolding the extent to which Africa responded to omissions in the UN Refugee Convention and the subsequent 1967 Protocol. Having had recourse to the negotiations leading to the UN Refugee Convention, this piece has shown that Egypt (the only representative from Africa that joined as a participant) played an active role in extending the scope of the protection of the UN Refugee Convention to further categories of refugees. Furthermore, owing to efforts to adopt an African convention separate from the UN Refugee Convention, the latter instrument was revised by means of a protocol that removed its temporal and geographical limitations. The analysis of the preparatory work ultimately helped in unfolding subsequent legal consequences that should be drawn from the UN Refugee Convention and its 1967 Protocol.

Throughout the analysis of the Bangkok Principles and the OAU Refugee Convention, this article has shown that some of their provisions are still very much part of the legal framework today, and that some of them may provide evidence of customary rules of international law. Even though the OAU

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Human and Peoples' Rights, app no 012/2015, 22 March 2018)" (2019) 1/1 *Statelessness & Citizenship Review* 170 at 174.

158 See, for example, *ibid*.

159 *Anudo v Tanzania*, above at note 151, para 80.

160 *Id*, paras 99–101.

161 Gina Bekker advanced in 2013 that it was "likely that the African Commission will for some time yet be the primary institution through which asylum-seekers and refugees will seek to have their rights vindicated": Bekker "The protection of asylum seekers", above note at 118 at 28.

Refugee Convention was adopted to respond to certain refugee problems specific to the African continent, it “established an important precedent in international law” becoming a direct inspiration for other legal instruments for the protection of refugees.¹⁶² Regional human rights instruments adopted under the auspices of the African Union and its predecessor, the OAU, have further enriched international refugee law. Likewise, as considered in this article, the regional human rights mechanisms entrusted with their supervision have also played an important role in the development of international refugee law. Some of their pronouncements have further been endorsed by other supra-national courts. Yet, it is obvious that Africa’s contributions to the progressive development of international refugee law, however positive, have not yet solved the refugee situation in Africa, or elsewhere.

CONFLICTS OF INTEREST

None

162 Arboleda “Refugee definition”, above at note 38 at 195.