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# REASSESSING ASPECTS OF THE CONTRIBUTION OF AFRICAN STATES TO THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH AFRICAN REGIONAL MULTILATERAL TREATIES

*Tiyanjana Maluwa\**

## I. INTRODUCTION

The role of international law in Africa—and Africa’s contribution to international law’s development—has been the subject of scholarly debate in the decades since the first wave of African countries gained independence from colonial rule in the early 1960s.<sup>1</sup> Two related, but facially contradictory, concerns have emerged from these debates over multiple generations. The first is that European colonial powers have deliberately erased Africa and Africans from the history of the creation and use of international law. The second is that Africa does not receive credit for contributing to the making of international law in the postcolonial era, if not earlier. Both concerns implicitly offer an alternative interpretation of the history of international law in Africa, and those endorsing these concerns have sought to show that Africa “has always made, and continues to make, international law as an innovator and generator of human knowledge, institutions, and rules.”<sup>2</sup>

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\* H. Laddie Montague Chair in Law, Pennsylvania State University School of Law—University Park, former Legal Counsel of the Organization of African Unity (1997–2001). An initial draft of this paper was presented at a seminar of the Berlin-Potsdam Research Group (“The International Rule of Law—Rise or Decline?”) at Humboldt University, Berlin. I am grateful to the participants for their thoughtful questions and comments. I have since benefited from further criticisms and suggestions from other colleagues and reviewers on various aspects of the discussion, and from perceptive critiques from and useful exchanges with the editors of the *Michigan Journal of International Law*.

1. Examples of the first generation of postcolonial African international law scholars to examine these questions, starting in the 1970s, include CHUKS F. OKOYE, *INTERNATIONAL LAW AND THE NEW AFRICAN STATES* (1972); TASLIM O. ELIAS, *AFRICA AND THE DEVELOPMENT OF INTERNATIONAL LAW* (Richard Akinjide ed., 2d ed. 1988); and JOSEPH-MARIE BIPOUM-WOUM, *LE DROIT INTERNATIONAL AFRICAIN: PROBLÈMES GÉNÉRAUX, RÉGLEMENT DES CONFLITS* (1970).

2. See Jeremy Levitt, *Introduction—Africa: A Maker of International Law*, in *AFRICA: MAPPING NEW BOUNDARIES IN INTERNATIONAL LAW*, at vii (Jeremy Levitt ed., 2008).

Thus, though their concerns took different forms, earlier commentators agreed on two general propositions. First, that although the imperial powers regarded the legal regimes of precolonial African states and communities as *tabula rasa*—and later regarded colonial-era African states as objects of a Eurocentric international law—by the mid-1960s the newly independent African states had ceased to be merely objects, and were assuming their place as creators, of contemporary international law. Second, that the active participation of the new African states in the international legal order had, in fact, advanced the frontiers of traditional international law.<sup>3</sup>

More recently, a new generation of scholars has taken up these questions, challenging even more vigorously the Eurocentric mythology of the origins of international law and the imperialist assumption that pre-colonial Africa was devoid of law, and, in particular, international law.<sup>4</sup> Most of this recent discussion has been rooted within the theoretical and methodological school known as Third World Approaches to International Law (“TWAIL”).<sup>5</sup> TWAIL does not represent a single voice or text, but rather a

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3. See UNITED NATIONS INSTITUTE FOR TRAINING AND RESEARCH, *AFRICAN INTERNATIONAL LEGAL HISTORY 3* (A.K. Mensah-Brown ed., 1975). See generally U. O. UMOZURIKE, *INTERNATIONAL LAW AND COLONIALISM IN AFRICA* (1979) (discussing the history and metamorphosis of international law in Africa from the advent of colonialism—following the Berlin Conference of 1884/85, which was used to justify depriving African peoples of their sovereignty on the basis of the right of European powers to occupy and impose their own sovereignty over what they regarded as *terra nullius*—through the colonial and postcolonial periods, in which the former African colonies asserted their contribution to aspects of modern international law, for example in relation to the right of self-determination for colonial or colonized peoples through their anti-colonial struggles); YILMA MAKONNEN, *INTERNATIONAL LAW AND THE NEW STATES OF AFRICA* (1983) (discussing the contribution of the newly independent African states to a specific area of international law, namely state succession).

4. See generally UMOZURIKE, *supra* note 3; Jeremy Levitt, *The African Origins of International Law: Myth or Reality?*, 19 *UCLA J. INT’L L. & FOREIGN AFF.* 113, 158–59 (2015) (rejecting the historical assumption that international law began with the Treaty of Westphalia of 1648 and, instead, arguing that the legal influence of African states predates that of modern European states by nearly 6000 years—going back to the New Kingdom period in Egypt from 1570 to 1070 BCE, when African states engaged in treaty relations and applied rules of custom and general principles of law that are today called sources of international law); James Gathii, *Africa and the History of International Law*, in *THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW* 407, 407–28 (Bardo Fassbender et al. eds., 2012) (tracing the two major trends in thinking about Africa’s engagement with international law, “contributionism” and “the critical approach” which, respectively, emphasize Africa’s contribution to international law and examine Africa’s subordination in its international relations as a legacy that is traceable to international law).

5. See, e.g., James Gathii, *TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography*, 3 *TRADE, L. & DEV.* 26 (2011) (giving an account of the history and objectives of TWAIL and an introductory bibliography); Makau Mutua, *What Is TWAIL?*, 94 *AM. SOC’Y INT’L L. PROC.* 31 (2000) (discussing TWAIL’s three basic objectives as being to “[understand], deconstruct, and unpack the uses of international law as a medium for the creation of a racialized hierarchy of international norms and institutions that sub-

multiplicity of vibrant voices that explore related questions around issues of colonial history, power, identity, and difference, and what they mean for international law.<sup>6</sup> Thus, the views and perspectives advanced by TWAIL scholars differ widely but share a common purpose: They advocate a critical reading and reconceptualization of international law to understand and recognize its historical origins in Europe, to interrogate its imperial hegemony, and to reform it so that it can better address the concerns of developing countries and peoples.

Most scholars writing on Africa and international law—both self-identifying “TWAILers” and others—agree on the imperialistic origins and underpinnings of international law. While some have focused on the theoretical and methodological questions of international law and the history of Africa’s relationship with and place in it, others—dubbed “contributionists”<sup>7</sup>—have emphasized the postcolonial contributions of African states to the development of international law, either broadly or in specific areas.<sup>8</sup> Yet others have taken on both tasks: interrogating the theory and methodology of international law, and assessing Africa’s contributions to its substantive content, both in its doctrinal and normative aspects. Still others, known as critical legal scholars, focus on the manner in which modern international

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ordinate non-Europeans to Europeans; [construct] and present an alternative normative legal edifice for international governance; and [eradicate] the conditions of underdevelopment in the Third World.”); Karin Mickelson, *Taking Stock of TWAIL Histories*, 10 INT’L COMMUNITY L. REV. 355 (2008) (discussing the origins of TWAIL and TWAIL’s relationship to earlier Third World scholarship, and arguing that TWAIL should be seen as part of a Third World tradition of international law scholarship rather than as the overarching framework in which to fit all Third World scholarship).

6. See Gathii, *supra* note 5, at 26, 29–30.

7. See Gathii, *supra* note 4, at 419.

8. See, e.g., NASILA S. REMBE, *AFRICA AND THE INTERNATIONAL LAW OF THE SEA* (1980); see also TIYANJANA MALUWA, *INTERNATIONAL LAW IN POST-COLONIAL AFRICA* (1999) (examining the practice of African states in their interactions with each other and with other states in the wider international community on various matters bearing on the creation of legal rules for the international community, and arguing that despite its apparent marginalization in the international system, Africa can stake a valid claim to being part of the ongoing process of shaping new rules and principles of international law while strengthening existing ones); Adetola Onayemi & Olufemi Elias, *Aspects of Africa’s Contribution to the Development of International Law*, in *SHIELDING HUMANITY: ESSAYS IN INTERNATIONAL LAW IN HONOUR OF JUDGE ABDUL G. KOROMA* 591–613 (Charles C. Jalloh & Olufemi Elias eds., 2015); ABDULQAWI YUSUF, *PAN-AFRICANISM AND INTERNATIONAL LAW* (2014) (discussing extensively the history and role of Pan-Africanism and the African integrationist movement, situating Africa’s contribution to international law, including to two of the issues discussed by this article—the contribution of African states to international refugee law and human rights law).

law continues the legacy of colonial disempowerment while providing spaces for reform.<sup>9</sup>

This article assesses the contribution of African states to the development of international law by focusing not so much on the theoretical paradigms—nor on the doctrinal contributions of individual African scholars and publicists—but on the actual practice of these states. Indeed, this article, while embracing the merits and contributions of TWAIL, does not aim to rehearse the debates that approach has generated. Instead, this article recognizes that international law-making is a practical and dialogic process—best appreciated by examining the practice of the states whose actions and omissions are relevant on the matter, and not merely through an interrogation of theoretical postulations. This article is accordingly practice-focused: It considers Africa’s impact on the development and practice of international law globally. In other words, it defines Africa’s “contributions” to the development of international law as those international law norms arising within Africa that have created new legal concepts or elaborated on existing ones, and which have subsequently exerted influence beyond the continent.

After almost six decades of postcolonial existence, African states have had more than ample opportunity and space to assess the Eurocentric body of international law supposedly bequeathed to them at independence by the departing colonial authorities. They have also had the benefit of time to initiate the revision of the accepted praxis, orthodoxies, and hierarchies of the received international legal order and thereby contribute effectively to the creation of a new international law. I propose to assess this contribution by surveying the outcomes of African states’ participation in the international law-making processes under the aegis of two organizations: the African Union (“AU”), established by the Constitutive Act of the African Union (“AU Constitutive Act”)<sup>10</sup> and its predecessor, the Organization

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9. See Gathii, *supra* note 4, at 419. Antony Anghie has explored these issues in a number of related works. See, e.g., Antony Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, 5 SOC. & LEGAL STUD. 321 (1996); *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT’L L.J. 1 (1999); see also Mutua, *supra* note 5, at 31; Antony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT’L L. 77, 102 (2003) (describing TWAIL as “an ongoing project that is continuously questioning not only the foundations and operations of international law, but also its own methodological premises”); B.S. Chimni, *Customary International Law: A Third World Perspective*, 112 AM. J. INT’L L. 1 (2018).

10. Constitutive Act of the African Union, July 11, 2000, 2158 U.N.T.S. 3 (entered into force May 26, 2001) [hereinafter AU Constitutive Act]. The AU Constitutive Act was adopted by fifty-three African countries in Lomé, Togo. It became operational after a transitional period of one year, as provided for in its article 33(1). The AU was formally inaugurated on July 9, 2002. See African Union Assembly, Decision on the Interim Period, Ass/AU/Dec. 1(I) (July

of African Unity (“OAU”).<sup>11</sup> These two organizations have provided the fora for intra-African cooperation and coordination since shortly after African states began to gain independence in the mid-1950s.<sup>12</sup> This essay is thus both an exploration and an assessment of the contribution of African states to the development of international law through the law-making treaties of the AU and OAU in the postcolonial era.

I argue that three categories of norms emerge from AU and OAU multilateral treaties. The first category comprises norms that (1) are original and distinct from existing universal international law norms and (2) were developed by African states through regional, multilateral treaties regulating relations between African states. These rules have not yet been codified into binding general international law as treaties or as customary rules.<sup>13</sup> Yet the normative innovations in these regional treaties hold great potential for influencing future developments in international law globally. The AU Convention for the Assistance and Protection of Internally Displaced Persons of 2009 (the “Kampala Convention”), which is the only international, continent-wide treaty of its kind in the world, exemplifies this first category.<sup>14</sup>

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9-10, 2002); Nsongurua J. Udombana, *The Institutional Structure of the African Union: A Legal Analysis*, 33 CAL. WES. INT’L L.J. 69, 72 (2002).

11. Established by the Charter of the Organization of African Unity, 479 U.N.T.S. 39 (entered into force Sept. 13, 1963) [hereinafter OAU Charter]. The AU replaced the OAU upon its inauguration on July 9, 2002. See African Union Assembly, Ass/AU/Dec. 1(I); see also Tiyanjana Maluwa, *The Constitutive Act of the African Union and Institution-Building in Postcolonial Africa*, 16 LEIDEN J. INT’L L. 157, 157 (2003); Udombana, *supra* note 10. See generally Corinne Packer & Donald Rukare, *The New African Union and Its Constitutive Act*, 96 AM. J. INT’L L. 365 (2002).

12. With a handful of exceptions, notably South Africa (1910), Egypt (1922), and Libya (1951), 1956 marks the first phase of African state independence with Sudan, Morocco, and Tunisia each gaining independence. The trend continued with Ghana (1957), Guinea (1958), and then no fewer than seventeen countries in 1960 alone and four each in 1961 and 1962, which marked the second phase of independence. The third phase spanned the mid-60s and 70s, with the last countries to achieve independence being Zimbabwe (1980), Namibia (1990), Eritrea (1993), and more recently South Sudan (2011).

13. It is important to underscore that this discussion is not an examination of the practice of African states as it relates to the development of customary international law. This article only addresses aspects of conventional international law contained in and developed by the multilateral treaties adopted by these states. The role that African states have played and will continue to play in the development of customary international law is an important question that also requires a separate discussion. Some scholars have addressed the issue indirectly. For example, Chimni’s analysis of the role of Third World countries in the construction of customary international law necessarily includes African states, which form a large part of that group. See generally Chimni, *Customary International Law: A Third World Perspective*, *supra* note 9; George Rodrigo Bandeira Galindo & Cesar Yip, *Customary International Law and the Third World: Do Not Step on the Grass*, 16 CHINESE J. INT’L L. 251 (2017).

14. African Union Convention for the Assistance and Protection of Internally Displaced Persons, Oct. 2, 2009, 52 I.L.M. 397 (entered into force Dec. 6, 2010) [hereinafter Kampala Convention]. The Kampala Convention was preceded by the adoption on December

The second category consists of norms established in some African regional treaties with the objective of supplementing legal norms established in existing international treaties and enriching them by expanding their scope of application or the rights and obligations that they carry for African states. The relevant OAU or AU treaties are deliberately designed to complement certain United Nations (“UN”) treaties by adding rights, rules, and principles that address specific areas of concern and interest to African states and that are applicable only in the context of intra-African relations.<sup>15</sup> In this respect, I should note that, in general, the rights referred to here are not rights belonging to the state, but rights to be granted to individuals within these states.

There is also a third category: African states have also adopted multilateral treaties under the auspices of African sub-regional organizations such as the Economic Community of West African States (“ECOWAS”) and the Southern African Development Community (“SADC”). However, this article does not discuss these treaties, even if they might form an aspect of state practice relating to the development of international law in some respect or another. This is because the focus of this article is on the practice of African states in international law-making within the institutional framework of the AU and its predecessor. While an examination of these treaties might bear profit, it is outside the intended scope of this article. For the same reason, this article contains only limited discussion of the contribution of African states to the UN’s international law-making processes.<sup>16</sup>

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15, 2006 of a sub-regional agreement on internally displaced persons by twelve east and central African countries, acting under the aegis of the International Conference on the Great Lakes Region (“ICGLR”). See ICGLR, Great Lakes Pact on Security, Stability and Development art. 12 (Dec. 15, 2006), <http://www.icglr.org/index.php/en/the-pact>.

15. One example of these treaties is the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45 (entered into force June 20, 1974) [hereinafter OAU Refugee Convention]. The OAU Refugee Convention is one of the earliest multilateral treaties adopted by African states in the immediate postcolonial era. There is a tendency among some commentators nowadays to refer to it as the “AU Refugee Convention,” which is wrong, as it misrepresents the official title of the treaty. See, e.g., Cristiano d’Orsi, *The AU Convention on Refugees and the Concept of Asylum*, 3 PACE INT’L L. REV. ONLINE COMPANION 220 (2012). A much later example is the African Charter on the Rights and Welfare of the Child, July 1, 1990, OAU Doc. CAB/LEG/24.9/49 (entered into force Nov. 29, 1999) [hereinafter African Children’s Rights Charter or ACRWC]. The OAU Refugee Convention is the counterpart to the 1951 UN Convention on the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954) [hereafter UN Refugee Convention], while the ACRWC supplements the UN Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC].

16. Equally, the discussion is limited to developments in norm-creation through OAU and AU treaties, and it does not address the contribution of African states to norm-creation under the various treaties and other legal instruments adopted by the UN, of which these states (with the sole exception of the Sahrawi Arab Democratic Republic) are also members. Therefore, I do not examine in any detail the question of how—based on their regional treaty-

In Part II, following this introduction, I briefly describe the treaty-making process in the AU. I then discuss three selected AU and OAU treaties chronologically to illustrate their normative contributions, actual and potential, to the development of international law.<sup>17</sup> In particular, I assess each of the treaties that I have selected to determine if it falls into one of the two categories described above, either (1) establishing new norms of international law for the states parties concerned, and hence contributing to the corpus of regional African international law, or (2) supplementing existing international law for the specific African regional context. Note that all of these instruments have contributed to the growing corpus of African regional international law, or what Abdulqawi Yusuf characterizes as the development of the public law of Africa<sup>18</sup> This article aims to contribute to the ongoing conversation about this phenomenon, and to investigate its content and the processes for its creation.

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making practices and experiences—African states have influenced the UN agenda or shaped debates on various subjects at the UN (even to the extent that such agenda and debates may have a bearing on international law-making).

17. These are the OAU Refugee Convention, *supra* note 15, the African Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 217 [hereinafter African Charter], the African Children's Rights Charter, *supra* note 15, and the AU Constitutive Act, *supra* note 10. I also discuss, more briefly, two other treaties, namely the Kampala Convention, *supra* note 14, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, July 11, 2003, African Union Assembly, Decision on the Draft Protocol to the African Charter on Human and Peoples' Rights Relating to Women, Assembly/AU/Dec.19 (III) (July 11, 2003) <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa> [hereinafter The Protocol on the Rights of Women in Africa].

18. See Abdulqawi A. Yusuf, *The Public Law of Africa and International Law: Broadening the Scope of Application of International Law and Enriching Them for Intra-African Purposes*, in SHIELDING HUMANITY: ESSAYS IN INTERNATIONAL LAW IN HONOUR OF JUDGE ABDUL G. KOROMA 513-14 (Charles C. Jalloh & Olufemi Elias eds., 2015) (describing the "public law of Africa" as follows: "African States [began] to develop a public law of Africa consisting of rules, principles and practices applicable to intra-African relations. This public law of Africa provides a normative framework for the realization of the political, social and economic objectives of Pan-Africanism. It also tries to address the aspirations of the peoples of the continent in terms of human rights protection, peace and security and political and economic integration. Some aspects of this public law possess, however, a universal vocation, in the sense that they may eventually influence the adoption of similar international legal rules outside the continent."). See also Abdulqawi A. Yusuf, *The Emergence of an African Public Law and Its Potential Impact on International Law*, 20 AFR. Y.B. INT'L L. 141 (2014). This terminology has a historical antecedent in the notion of "public law of Europe," which some European writers suggested as the name for international law in the eighteenth and nineteenth centuries, as international law in that period had a Christian and European basis. See Alexander Orakhelashvili, *The Idea of European International Law*, 17 EURO. J. INT'L L. 315, 336-338 (2006). See generally INTERNATIONAL LAW IN THE LONG NINETEENTH CENTURY (1776-1914): FROM THE PUBLIC LAW OF EUROPE TO GLOBAL INTERNATIONAL LAW? (Inge Van Hulle & Randall Lesaffer eds., 2019).

The legal instruments discussed in this essay are examples of path-breaking African conventions. Some, such as the African Charter and the OAU Refugee Convention, have unmistakably influenced normative developments in international law beyond Africa. One, the Kampala Convention, is without precedent, as there is neither another continent-wide instrument nor a universal UN convention on internally displaced persons (“IDPs”). Africa’s regional norm-creation in this area of international law might thus be a harbinger of future developments at the global level. In all of these cases, the overarching question is the extent to which the instruments adopted under the aegis of the OAU or the AU enrich international law. I break down this question into two parts: First, how do African states set the international legal agenda by formulating problems and proposing solutions? Second, in setting the agenda, do African states disturb or disrupt the international legal system or, rather, provide clarity and move it forward?

In Part III, I turn to a separate but related issue: African contributions to normative developments outside the framework of the OAU and AU. This discussion is no more than a brief excursus touching on a couple of examples. These relate to the adoption of African common positions in the negotiation and drafting of UN and other multilateral treaties. Part IV concludes the discussion.

## II. TREATIES OF THE ORGANIZATION OF AFRICAN UNITY AND AFRICAN UNION: SELECTED NORMATIVE CONTRIBUTIONS TO INTERNATIONAL LAW

The OAU and AU share a common characteristic with the UN: Their founding instruments do not formally endow them with legislative powers.<sup>19</sup> Yet, to varying degrees, all three bodies perform or have performed limited legislative functions affecting the development of international law. In more than half a century of multilateral treaty-making under the OAU and AU, Member States of those organizations have adopted sixty-three law-making or norm-creating instruments.

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19. There was no provision in the OAU Charter empowering any of its organs to legislate for its Member States. Similarly, the AU Constitutive Act has no provision to that effect. As with the charter of the United Nations, these founding charters contemplated that their objectives would be carried out mainly through recommendations aimed at coordinating the actions of the Member States. The charters limited organizational authority to adopt rules that would be mandatory on the Member States to internal administrative matters of the organizations. What was not contemplated was that the political bodies of these organizations could act like legislatures—despite being denied legislative power—by adopting law-making treaties, declarations of law, or decisions on non-administrative matters with potential normative effect. See Oscar Schachter, *The UN Legal Order: An Overview*, in *THE UNITED NATIONS AND INTERNATIONAL LAW* 3, 3–4 (Christopher C. Joyner ed., 1997).

Admittedly, the OAU adopted only a modest number of treaties in its thirty-seven years of existence from 1963 to 2002: twenty-two in all.<sup>20</sup> Of these, nineteen are currently in force.<sup>21</sup> For its part, the AU, which replaced the OAU, started rather busily: Within the first three years of its existence, it adopted 10 instruments, one of which entered into force within that period.<sup>22</sup> At this writing (December 2019), the AU has adopted forty-one instruments, sixteen of which are in force; for the most part, however, these instruments do not fall into the category of binding international treaties.<sup>23</sup> Between both organizations, thirty-five instruments are currently in force.<sup>24</sup> This is a rather

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20. See AFRICAN UNION, *OAU/AU Treaties, Conventions, Protocols & Charters*, <https://au.int/treaties> (last visited Nov. 20, 2019) (listing all twenty-two treaties).

21. *Id.*

22. Protocol Relating to the Establishment of the Peace and Security Council of the African Union, July 9, 2002, <https://au.int/en/treaties/protocol-relating-establishment-peace-and-security-council-african-union> [hereinafter AU Peace and Security Protocol].

23. The sixteen AU treaties in force are: the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (2003); the Revised African Convention on the Conservation of Nature and Natural Resources (2003); the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003); the Protocol of the African Court of Justice of the African Union (2003); the African Union Convention on Preventing and Combating Corruption (2003); the Protocol to the OAU Convention on the Prevention and Combating of Terrorism (2004); the African Union Non-Aggression and Common Defence Pact (2005); the African Youth Charter (2006); the African Charter on Democracy, Elections and Governance (2007); the African Charter on Statistics (2009); the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (2009); the African Charter on Values and Principles of Public Service and Administration (2011); the Revised Constitution of the African Civil Aviation Commission (2010); the African Charter on the Values and Principles of Decentralization, Local Governance, and Local Development (2014); and the Agreement Establishing the African Continental Free Trade Agreement (2018). See AFRICAN UNION, *OAU/AU Treaties, Conventions, Protocols & Charters*, *supra* note 20.

24. See *id.* The list includes some instruments that are not treaties in the strict sense of the term. Among these are the Statute of the African Union Commission on International Law; the Statute for the Establishment of Legal Aid Fund for African Human Rights Organs; the Statute of the African Sports Council; the Statute of the African Science Research and Innovation Council; and the Statutes of the Economic, Social, and Cultural Council of the African Union. These statutes entered into force immediately upon adoption by the AU Assembly of Heads of State and Government, and the AU characterizes them as "treaties in force"—even though Member State signature or ratification was not required for their effect. How is this possible? The entry into force of treaties is governed by the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. Under article 11 of the Vienna Convention, consent of a state to be bound by a treaty may be expressed by "signature, ratification, acceptance, approval or by any other means if so agreed." Vienna Convention art. 11. Article 24 further provides that "[a] Treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree," and: "[f]ailing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States." Vienna Convention art. 24(1)–(2). The statutes are adopted unanimously in conformity with the AU's decision-making procedure by the supreme decision-making organ of the AU, the AU Assembly of

modest number as compared, for example, to the enormous number of treaties adopted under the auspices of the UN.<sup>25</sup> However, the value of these treaties does not lie in their numbers as such. Rather, it lies in the law-creating function that some of them perform for the African region and, as I argue, for the international community generally, through their potential to influence the development of international law.

#### A. *The AU Treaty-Making Process*

The multilateral treaty-making process is, in the AU as in other international organizations, essentially a process of negotiation. Such negotiation may cover a wide range of initiatives and stages, both formal and informal, and may originate from a proposal from a variety of actors. For example, formal proposals by individual Member States to elaborate a treaty on a particular subject may originate within the representative organs of an international organization. Informal contacts and discussions (whether internal or external) can also lead to proposals to elaborate a treaty. Individual Member States and external bodies initiating a proposal must submit it, through the AU Commission, for consideration by the appropriate AU organs.<sup>26</sup>

Most OAU and AU treaties are initiated by the AU Commission (or formerly by the OAU General Secretariat), often as a result of a proposal from one or more Member States. Following consultations with stakeholders, the AU Commission drafts the text for the proposed treaty, which it then submits to the AU's Permanent Representatives Committee ("PRC")—a standing committee of Member States ambassadors accredited by the

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Heads of State and Government. All Member States are represented in this organ and participate in its decision-making. The statutes are adopted with the intention that they become operative immediately without any further requirement for signature and/or ratification, as is ordinarily the case with AU other treaties. Therefore, it can favorably be argued that the unanimous consent expressed by the Member States when adopting the statutes satisfies the conditions for entry into force stipulated in the Vienna Convention. This is presumably why the AU Commission classifies these statutes as "treaties in force."

25. Over 560 multilateral treaties, most of which have been adopted under the auspices of the UN or with UN assistance, are deposited with the UN Secretary-General. See United Nations, Multilateral Treaties Deposited with the Secretary-General, [https://treaties.un.org/pages/Content.aspx?path=DB/MTDMSGStatus/pageIntro\\_en.xml](https://treaties.un.org/pages/Content.aspx?path=DB/MTDMSGStatus/pageIntro_en.xml) (under "Introduction"); see also Palitha Kohona, *Opinion: Multilateral Treaty Framework—An Abiding Achievement of the U.N.*, IPS NEWS (Sept. 29, 2015), <http://www.ipsnews.net/2015/09/opinion-multilateral-treaty-framework-an-abiding-achievement-of-the-u-n>.

26. See, e.g., the Revised African Convention on the Conservation of Nature and Natural Resources, Jul. 11, 2003 (entered into force Jul. 23, 2016), available at [https://au.int/sites/default/files/treaties/7782-treaty-0029\\_-\\_revised\\_african\\_convention\\_on\\_the\\_conservation\\_of\\_nature\\_and\\_natural\\_resources\\_e.pdf](https://au.int/sites/default/files/treaties/7782-treaty-0029_-_revised_african_convention_on_the_conservation_of_nature_and_natural_resources_e.pdf). The OAU General Secretariat collaborated with the United Nations Environment Programme on its elaboration. [Editor's note: The AU website erroneously indicates this convention's date of adoption as March 7, 2017. The author has confirmed this error with the AU Office of the Legal Counsel in a personal communication.]

AU—either at the subcommittee level or to the full membership. Following debate in the recipient PRC body, the draft text goes to either a meeting of experts or a ministerial meeting where the sectors affected by the subject matter of the proposed treaty are represented. The AU's Executive Council (composed of Member States' ministers responsible for foreign affairs) considers any draft emanating from the experts or ministerial meeting and determines whether to recommend the draft to the Assembly for its formal adoption. If the treaty is adopted by the Assembly,<sup>27</sup> it is usually immediately opened for signature. But in at least one case under the OAU, a meeting of relevant sectorial ministers adopted a treaty that was endorsed by the Council of Ministers without referral to the OAU Assembly.<sup>28</sup>

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27. The Assembly of Heads of State and Government is the supreme policymaking organ of the AU. AU Constitutive Act, *supra* note 10, art. (6)(2). One of its cardinal functions is to discuss matters of common concern to the African continent with a view to coordinating and harmonizing the general policy of the organization. *Id.* art. 9(1)(a). Read together, a number of provisions of the AU Constitutive Act suggest that the Assembly possesses the supreme authority to make decisions for the general good of the Member States. *Id.* art. 9(1)(a)–(c), (e). The decisions of the Assembly concerning the adoption of treaties, as expressions of common policies of the Member States, are taken within the purview of the Assembly's powers under the AU Constitutive Act, specifically under article 9(1)(a). The Assembly, which is composed of heads of state or government or their accredited representatives, *id.* art. 6(1), is a plenary body in which all Member States are represented. While Member States that fail to comply with the decisions and policies of the organization may be subjected to sanctions in terms of article 23(2) of the AU Constitutive Act, decisions relating to the adoption of treaties do not bind the Member States to the treaties or oblige them to become parties. The treaties still have to be signed and ratified by individual states as a matter of sovereign consent, consistent with the established rules of international law under the Vienna Convention on the Law of Treaties.

28. The example here is the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa. *See* Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa, CM/Res.1356 (LIV), Jan. 30, 1991, 2101 U.N.T.S. 177. It was negotiated and adopted by a Conference of Ministers of Environment representing twelve OAU member States held in Bamako, Mali, on January 30, 1991. Notably, it was not referred to the OAU Council of Ministers or Assembly of Heads of State and Government for formal endorsement or further adoption like other OAU treaties. *See* OAU Council of Ministers, Resolution on the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa, CM/1356 (LIV), Jan. 30, 1991 (partly stating: “[*Having considered*] the report of the Secretary-General of the OAU (Doc. CM/1673 (LIV) on the Pan-African Conference on Environment and Sustainable Development held in Bamako, Mali, from 23 to 30 January 1991 . . . [1. *Takes note*] with satisfaction of the Secretary-General's report on this issue; . . . [3. *Requests*] OAU Member States who have not yet signed and ratify [*sic*] the Convention to do so, so as to bring it into force.”). Pursuant to this resolution, Member States signed and ratified the Bamako Convention without the need for its formal endorsement or adoption by the Assembly of Heads of State and Government. This was exceptional because the OAU Charter did not expressly provide for the Assembly of Heads of State and Government to delegate its authority as the supreme policymaking organ under article VIII to the Council of Ministers. By contrast, article 9(2) of the AU Constitutive

B. *The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969): Expanding International Refugee Law*

Africa's contribution to developments in international refugee law makes for a good starting point for two reasons. First, the adoption of the OAU Refugee Convention was the first occasion on which a group of States established a regional regime for the protection of refugees. In 1969, international refugee law was still in its early stages of development. A special UN conference had adopted the UN Refugee Convention, the first global instrument on refugees, eighteen years earlier on July 28, 1951.<sup>29</sup> At that time, four independent African states were UN members: Egypt, Ethiopia, Liberia, and the Union of South Africa. However, only Egypt participated in the conference.<sup>30</sup> By the time the OAU adopted its regional instrument on September 10, 1969, Liberia was the only country among the four African founding members of the UN that had ratified the UN Refugee Convention, on October 15, 1964.<sup>31</sup>

Second, historically this represents the first area in which the OAU made a substantive, normative contribution to an area of international law. In the OAU Refugee Convention, African states incorporated rules and principles that were strategically formulated to clarify and improve on the protections enshrined in the UN Refugee Convention. Indeed, the OAU Refugee Convention is described in its own terms in article VIII(2) as "the effective regional complement in Africa of the UN Convention."<sup>32</sup> In this respect, the OAU Convention purported to broaden the definition of a refu-

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Act expressly provides for the delegation of the powers and functions of the Assembly "to any organ of the Union." AU Constitutive Act, *supra* note 10, art. (9)(2).

29. The conference that adopted the convention was convened pursuant to UN General Assembly Resolution 429 (V), adopted on December 14, 1950, and was held in Geneva, Switzerland, from July 2 to 25, 1951. See U.N. Conference of Plenipotentiaries on the Status of Stateless Persons and Refugees, Convention Relation to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.

30. See U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, U.N. Doc. A/Conf.2/108 (July 25, 1951).

31. United Nations High Commissioner for Refugees, States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol (Apr. 2015), <https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>. In the intervening period, twenty other newly independent African states that had become UN members joined the UN Refugee Convention through accession or state succession: Algeria (Feb. 21, 1963), Burundi (July 19, 1963), Cameroon (Oct. 23, 1961), Central African Republic (Sept. 4, 1962), Congo (Oct. 15, 1962), Côte d'Ivoire (Dec. 8, 1961), Democratic Rep. of the Congo (July 19, 1965), Gabon (Apr. 27, 1964), Gambia (Sept. 7, 1966), Ghana (Mar. 18, 1963), Guinea (Dec. 28, 1965), Kenya (May 16, 1966), Madagascar (Dec. 18, 1967), Morocco (Nov. 7, 1956), Niger (Aug. 25, 1961), Nigeria (Oct. 23, 1967), Senegal (May 2, 1963), Togo (Feb. 27, 1962), Tunisia (Oct. 24, 1957), and United Rep. of Tanzania (May 12, 1964). *Id.*

32. OAU Refugee Convention, *supra* note 15, art. VIII(2).

gee; the principle of *non-refoulement*; the individual right to asylum; and notions of burden-sharing, temporary protection, and voluntary repatriation.<sup>33</sup>

### 1. Broadening the Definition of a Refugee

Article 1(A)(2) of the 1951 UN Refugee Convention defines a refugee as a person who is outside the country of his or her nationality (or place of habitual residence, in the case of stateless persons) due to a well-founded fear of persecution on account of his or her race, religion, nationality, political opinion, or membership in a particular social group, and who, owing to such fear, is unwilling to avail himself or herself of the protection of that country.<sup>34</sup>

In their analysis of the UN Refugee Convention's definition of a "refugee," James Hathaway and Michelle Foster identify seven elements to the definition: (1) alienage; (2) well-founded fear; (3) serious harm; (4) failure of state protection; (5) nexus to civil and political status; (6) needing protection; and (7) deserving protection.<sup>35</sup> Before proceeding to offer deeply comprehensive analyses of each element in their seminal treatise, Hathaway and Foster summarize these elements thus: First, "alienage" means that to be a refugee, a person must be first and foremost a person outside her country of origin or, in the case of a stateless person, outside her country of former habitual residence.<sup>36</sup> Second, a person must have a "well-founded fear," which requires a "real chance" of objective risk, not just subjective fear.<sup>37</sup> Third, a person must face "serious harm"—arguably the central plank of the refugee definition—in her country of origin; there be a real risk of being persecuted on return.<sup>38</sup> Fourth, a person's home country must fail to protect her—either because it is unwilling or unable to do so.<sup>39</sup> Fifth, the person's well-founded fear of being persecuted must have a "nexus" to her "civil and political status"—that is, the persecution must arise from any one of the grounds stipu-

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33. George Okoth-Obbo, *The OAU/UNHCR Symposium on Refugees and Forced Population Displacements in Africa—A Review Article*, 7 INT'L J. REFUGEE L. 274, 287–89 (1995) (noting that given the restrictive interpretation of the 1951 UN Convention in certain parts of the world, the OAU Convention is commonly cited as a model that offers the legal means and flexibility for the protection of, assistance to and solutions for more of the world's refugees).

34. UN Refugee Convention, *supra* note 15, art. 1(A)(2).

35. JAMES C. HATHAWAY & MICHELLE FOSTER, *THE LAW OF REFUGEE STATUS* 13 (2d ed. 2014).

36. *Id.* at 14.

37. *Id.*

38. *Id.*

39. *Id.*

lated in the Convention.<sup>40</sup> Sixth, the refugee must “need protection”—the refugee cannot be someone who either still has or can regain the protection of her own country or who has access to alternative forms of protection tantamount to national protection.<sup>41</sup> Finally, the refugee must “deserve protection,” or else she may nevertheless be excluded from recognition and protection as a refugee because of her criminal or quasi-criminal actions.<sup>42</sup>

Commentators have criticized the UN Refugee Convention on a number of grounds, three of which stand out. First, its definition of a refugee implies the exclusion of internally displaced persons. That is because a persecuted person who fails to fulfil the alienage requirement—a person who is internally displaced—does not enjoy the protection of the international refugee law regime.<sup>43</sup>

Second, the picture that emerges in Western jurisprudence and from the scholarship is that the meaning of “well-founded fear of persecution” is contested.<sup>44</sup> It seems clear that a “well-founded fear of persecution” analytically consists of three elements, namely (i) “well-founded fear” (*i.e.*, *genuine, objective risk*) of “being persecuted,” which occurs when there is (ii) a *serious harm* (iii) against which the *state fails to protect*. But while nearly all courts apply all these three elements, the jurisprudence under each element has diverged considerably, and not all courts evaluate failure of state protection in the analysis of persecution.

Third, the Convention’s requirement that the refugee’s persecution have a nexus to one or more of the refugee’s *civil or political* characteristics excludes persons fleeing other kinds of life-threatening conditions or situa-

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40. *Id.* at 15.

41. *Id.*

42. *Id.*

43. However, the subsequent practice has been for the United Nations High Commission for Refugees (“UNHCR”), at the request of the UN Secretary-General and the General Assembly, to extend its mandate to internally displaced persons (“IDPs”). See Arthur C. Helton, *What Is Refugee Protection?*, 2 INT’L J. REFUGEE L. 119, 119–120 (1990); MALUWA, *supra* note 8, at 178.

44. See Walter Kalin, *Well-Founded Fear of Persecution: A European Perspective*, in ASYLUM LAW AND PRACTICE IN EUROPE AND NORTH AMERICA: A COMPARATIVE ANALYSIS 21–33 (Jacqueline Bhabha & Geoffrey Coll eds., 1992); see also Barbara Jackman, *Well-Founded Fear of Persecution and Other Standards of Decision-Making: A North American Perspective*, in ASYLUM LAW AND PRACTICE IN EUROPE AND NORTH AMERICA: A COMPARATIVE ANALYSIS, *id.* at 37, 44 (contrasting the approaches adopted by the courts in the English case of *R. v. Secretary of State for the Home Department, Ex Parte Sivakumaran* [1988] AC 958 (HL) and the Canadian case of *Adjei v. Canada (Minister of Employment and Immigration)* [1989] 2 FC 680 (FC:CA)). See generally Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 CORNELL INT’L L.J. 505 (1991) (examining the meanings that scholars, judges, and asylum officers in Germany, Canada, and the United States have given to persecution, especially persecution based on membership in social groups).

tions (such as famine, drought or environmental disasters).<sup>45</sup> The nexus requirement also excludes migrants who flee their countries primarily to escape harsh economic conditions, seeking improved standards of living elsewhere. Such migrants are commonly referred to as “economic refugees.”<sup>46</sup>

So how does the OAU Refugee Convention fare against these criticisms? Substantively, the OAU Refugee Convention expands the definition of a refugee. While article I(1) of the OAU Refugee Convention essentially reproduces the UN Refugee Convention definition,<sup>47</sup> article I(2) expands this definition as follows:

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.<sup>48</sup>

The OAU Refugee Convention’s definition therefore includes people forced into flight from anti-apartheid and anti-colonial liberation struggles

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45. See Director of International Protection, Office of the UN High Commissioner for Refugees [UNHCR], *Handbook on Procedure and Criteria for Determining Refugee Status*, ¶ 39, U.N. Doc. HCR/1P/4/Eng/Rev.1 (Jan. 1992). In its own analysis of the UN Refugee Convention, UNHCR states that:

[The expression] “well-founded fear of being persecuted”—for the reasons stated—by indicating a specific motive automatically makes all other reasons for escape irrelevant to the definition. It rules out such persons as victims of famine or natural disaster, unless they also have well-founded fear of persecution for one of the reasons stated. Such other motives may not, however, be altogether irrelevant to the process of determining refugee status, since all the circumstances need to be taken into account for a proper understanding of the applicant’s case.

46. See Andrew E. Shacknove, *Who Is a Refugee?*, 95 *ETHICS* 274, 278 (1985); see also LEON GORDENKER, *REFUGEES IN INTERNATIONAL POLITICS* 155 (1987); ALAN DOWTY, *CLOSED BORDERS: THE CONTEMPORARY ASSAULT ON FREEDOM OF MOVEMENT* (1987); Elizabeth G. Ferris, *Overview: Refugees and World Politics*, in *REFUGEES AND WORLD POLITICS* 4 (Elizabeth G. Ferris ed., 1985); MALUWA, *supra* note 8, at 178.

47. Compare OAU Refugee Convention, *supra* note 15, art. I(1) (“For the purposes of this Convention, the term “refugee” shall mean every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it.”), with UN Refugee Convention, *supra* note 15, art. 1(A).

48. *Id.* art. I(2).

and those fleeing civil wars in their countries.<sup>49</sup> Historical context shaped the contours of this definition:<sup>50</sup> The need to respond to the reality of the African continent at the time—armed conflict arising from anti-colonial struggles, internal civil wars and the resulting exoduses—were overriding considerations for the new definition.<sup>51</sup> Tamara Wood describes the context of the adoption of the OAU Refugee Convention as follows:

The context of the Convention's adoption is well understood. In 1969, Africa was a continent still very much engaged in the process of decolonization; many African states continued to struggle against colonial and minority powers and this led to frequent movements of people, as many left their countries to escape colonial oppression.<sup>52</sup>

The OAU Refugee Convention's expanded refugee definition improves upon the UN Refugee Convention's definition by introducing objective criteria for determining refugee status that are explicitly dependent on the prevailing situations in the refugee's country of origin. The OAU Refugee Convention's standard for persecution "requires neither the elements of deliberateness nor discrimination inherent in the 1951 Convention."<sup>53</sup> The generalized nature of the refugee-generating events listed in article I(2)—external aggression, occupation, foreign domination, and events seriously disturbing public order—means that the definition provides better protection to persons fleeing widespread or indiscriminate forms of harm, such as civil war.<sup>54</sup> A nontrivial construction of this definition also covers individuals forced to flee from their countries of origin or habitual residence due environmental and other humanitarian disasters.<sup>55</sup> Moreover, it is widely accept-

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49. Marina Sharpe, *Organization of African Unity and African Union Engagement with Refugee Protection: 1963–2011*, 21 AFR. J. INT'L & COMP. L. 50, 55–69 (2013) (discussing the legislative history of the Convention and its refugee definition).

50. See Eduardo Arboleda, *Refugee Definition in Africa and Latin America: The Lessons of Pragmatism*, 3 INT'L J. REFUGEE L. 185, 195 (1991).

51. MALUWA, *supra* note 8, at 180.

52. Tamara Wood, *Expanding Protection in Africa? Case Studies of the Implementation of the 1969 African Refugee Convention's Expanded Refugee Definition*, 26 INT'L J. REFUGEE L. 555, 557 (2014).

53. Eduardo Arboleda, *The Cartagena Declaration of 1984 and Its Similarities to the 1969 OAU Convention—A Comparative Perspective*, 7 INT'L J. REFUGEE L. 87, 95 (1995).

54. See George Okoth-Obbo, *The OAU/UNHCR Symposium on Refugees and Forced Population Displacements in Africa—A Review Article*, 7 INT'L J. REFUGEE L. 274, 287–88 (1995); Alice Edwards, *Refugee Status Determination in Africa*, 14 AFR. J. INT'L & COMP. L. 204, 231–32 (2006); see also Director of International Protection, UNHCR, *Handbook on Procedure and Criteria for Determining Refugee Status*, ¶ 164, U.N. Doc. HCR/1P/4/Eng/Rev.1 (Jan. 1992).

55. Some writers argue that article I(2) of the OAU Refugee Convention definition should be construed to allow for protection of persons displaced by environmental disaster or

ed that the OAU Refugee Convention's broadened refugee definition is particularly suited to group-based refugee status determinations and provides better protection to refugees in situations of mass influx,<sup>56</sup> like those which have characterized most refugee movements in Africa, continuing to the present day.

Equally important, because the definition allows for the relevant refugee-making event to occur in either "the whole or part" of the refugee's country of origin, refugees are not expected to pursue the so-called "internal flight alternative," which some states construe as implied in the UN Refugee Convention's definition. According to those states, the "internal flight alternative" requires a refugee to seek protection first elsewhere within her own country before she can qualify for refugee status in another country.<sup>57</sup> Though the UNHCR has rejected the internal flight alternative, explaining that it is not a necessary part of the UN Refugee Convention's definition of "refugee" and cannot be used to undermine the Convention's aims or international human rights norms, UNHCR cannot prevent states from including this element in the "well-founded fear" or "failure of state protection" elements of their analysis.<sup>58</sup> In contrast, the OAU Refugee Convention is unique in removing this possibility for signatory states.<sup>59</sup>

In brief, the expanded definition in the OAU Refugee Convention provides a pragmatic solution to the problem of determining refugee status during times of mass migrations or forced displacements when individual determinations are impractical, inadequate, or totally absent.<sup>60</sup> The definition also breaks new ground in international law by embracing an additional category of persons as refugees: namely, *all* those who are compelled to leave their country of origin in order to escape *external* aggression or occupation or *foreign* domination, regardless of whether the fleeing individual is being persecuted on account of a specific political or civil status.

Recall that the drafters of the OAU Refugee Convention definition employed terms such as "external aggression," "occupation," and "foreign

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climate change. See, e.g., Carlos Ortiz Miranda, *Toward a Broader Definition of Refugee: 20th Century Development Trends*, 20 CAL. WES. INT'L L.J. 315, 323 (1989); Edwards, *supra* note 54, at 225–27.

56. Cf. IVOR JACKSON, *THE REFUGEE CONCEPT IN GROUP SITUATIONS* 193 (1999); Anais Tuepker, *On the Threshold of Africa: OAU and UN Definitions in South African Asylum Policy*, 15 J. REFUGEE STUD. 409, 410 (2002).

57. See HATHAWAY & FOSTER, *supra* note 35.

58. UNHCR, *Guidelines on International Protection: Internal Flight or Relocation Alternative within the Context of Article 1(A)(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, ¶ 4, U.N. Doc. HCR/GIP/03/04 (July 23, 2003).

59. See *id.* ¶ 5 ("Consideration of possible internal relocation areas is not relevant for refugees coming under the purview of Article I(2).").

60. Arboleda, *Refugee Definition in Africa and Latin America: The Lessons of Pragmatism*, *supra* note 50, at 195.

domination” at a time when they had not acquired widely agreed or settled meanings in international law.<sup>61</sup> These terms pointed at the situation in some African states—especially in southern Africa—that were still under colonial rule or foreign occupation, or governed by minority racist regimes: South Africa, Southern Rhodesia (Zimbabwe), South West Africa (Namibia), and the various Portuguese African colonies.<sup>62</sup> These countries were theatres of wars of national liberation, and the OAU’s expanded refugee definition extended protection to both freedom fighters and their supporters. Intra-African conflicts in the African Great Lakes region and the massive refugee movements they have generated in the region during the last two and a half decades have been a reminder of the continuing relevance of this aspect of the expanded OAU refugee definition.<sup>63</sup>

Though the drafters of the definition were concerned with providing a flexible and pragmatic solution to the refugee problem,<sup>64</sup> Adetola Onayemi and Olufemi Elias have rightly pointed out that this does not mean that the OAU Refugee Convention establishes a lax regime.<sup>65</sup> On the contrary, while the OAU Refugee Convention broadens the definition in certain respects, it also expands the permissible bases for which a hosting state may revoke refugee status or exclude a refugee in the first place.<sup>66</sup>

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61. MALUWA, *supra* note 8, at 180.

62. See Medard R. Rwelamira, *Some Reflections on the OAU Convention on Refugees: Some Pending Issues*, 16 COMP. & INT’L L. J. SOUTHERN AFR. 155, 169 (1983) (discussing the struggles against colonialism, apartheid, and racist minority rule in these southern African countries as factors in the adoption of the OAU Refugee Convention and its expanded refugee definition); see also Marina Sharpe, *Organization of African Unity and African Union Engagement with Refugee Protection: 1963–2011*, *supra* note 49.

63. In theory, the provision is also applicable to external aggression among independent African countries, where it generates refugees.

64. Arboleda, *Refugee Definition in Africa and Latin America: The Lessons of Pragmatism*, *supra* note 50, at 195.

65. Onayemi & Elias, *supra* note 8, at 595.

66. Compare OAU Refugee Convention, *supra* note 15, art. 1(4)(f)–(g) (providing that the OAU Refugee Convention ceases to apply to any refugee who has “committed a serious non-political crime outside his country of refuge after his admission to that country as a refugee” or who has “seriously infringed the purposes and objectives of the Convention”), with UN Refugee Convention, *supra* note 15, art. 1(f) (providing that the UN Refugee Convention shall not apply to any person with respect to whom there are serious reasons for considering that “(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crime; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations”), and art. 1(c) (providing that the UN Refugee Convention ceases to apply to any refugee who has “voluntarily re-availed himself of the protection of the country of his nationality,” “voluntarily re-acquired” his original nationality, “acquired a new nationality and enjoys the protection of the country of his new nationality,” “voluntarily re-established himself in the country which he left or outside which he remained owing to fear

Since its adoption, scholars of refugee law and refugee studies, as well as experts and institutions concerned with refugees, have commended the OAU Refugee Convention's definition as a significant normative development in international refugee law.<sup>67</sup> Scholarly commentaries have also celebrated the innovative character of the OAU Refugee Convention, especially the expanded refugee definition, and reaffirmed its status as a regional complement to the UN instrument.<sup>68</sup> The OAU Refugee Convention has also informed developments at the multilateral level, internationally and regionally. Most notably, it provided the basis for the expanded definition of "refugee" in the Draft Convention on Territorial Asylum adopted by the UN General Assembly in 1977.<sup>69</sup> In 1984, the Organization of American States adopted a similar definition in the Cartagena Declaration on Refugees.<sup>70</sup>

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of persecution," or who "can no longer, because circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality," or likewise (for a stateless refugee) "is able to return to the country of his former habitual residence."). This is discussed further *infra* Part II.B.2.

67. See, e.g., HATHAWAY & FOSTER, *supra* note 35, at 2 n.7.

68. There is a copious scholarly literature on the OAU Refugee Convention dating from the earliest years following its adoption. See, e.g., Ousmane Goundiam, *African Refugee Convention*, in 2 MIGRATION NEWS 7 (1970); Paul Weis, *The Convention of the Organisation of African Unity Governing the Specific Aspects of Refugee Problems in Africa*, 3 REV. DE DROITS DE L'HOMME 449 (1970); Medard Rwelamira, *Two Decades of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, 1 INT'L J. REFUGEE L. 557 (1989); Joe Oloka-Onyango, *Human Rights, The OAU Convention and the Refugee Crisis in Africa: Forty Years After Geneva*, 3 INT'L J. REFUGEE L. 453 (1991); Rainer Hofmann, *Refugee Law in the African Context*, 52 HEIDELBERG J. INT'L L. 318 (1992); Christopher J. Bakwesegha, *The OAU and African Refugees*, in THE ORGANIZATION OF AFRICAN UNITY AFTER THIRTY YEARS 77 (Yassin El-Ayouty ed., 1994); Okoth-Obbo, *supra* note 54; Marina Sharpe, *The 1969 African Refugee Convention: Innovations, Misconceptions, and Omissions*, 58 MCGILL L.J. 97 (2012). But see Sharpe at 111–24 (discussing the OAU Refugee Convention's significant contributions and legal innovations to refugee protection in Africa, but arguing that one of the Convention's most misunderstood aspects is the notion that its definition of a refugee is much broader than that in the UN Refugee Convention).

69. United Nations Conference on Territorial Asylum, *Draft Convention on Territorial Asylum*, art. 2(1), U.N. Doc. A/CONF.78/12 (Apr. 21, 1977):

Each Contracting State may grant the benefits of this Convention to a person seeking asylum, if he, being faced with a definite possibility of: (a) Persecution for reasons of race, colour, national or ethnic origin, religion, nationality, kinship, membership of a particular social group or political opinion, including the struggle against colonialism and *apartheid*, foreign occupation, alien domination and all forms of racism; or (b) Prosecution or punishment for reasons directly related to the persecution set forth in (a); is unable or unwilling to return to the country of his nationality, or, if he has no nationality, the country of his former domicile or habitual residence.

70. Cartagena Declaration, *supra* note 74; see Arboleda, *The Cartagena Declaration of 1984 and Its Similarities to the 1969 OAU Convention—A Comparative Perspective*, *supra*

The OAU's expanded refugee definition has also provided practical guidance to the UNHCR, and an expansion of its mission. The UNHCR's recognition of the normative importance of the OAU Refugee Convention's definition was underscored by UN High Commissioner for Refugees António Guterres in 2014 during the commemoration of the fortieth anniversary of the OAU Refugee Convention's adoption. He declared that the Convention "is considered one of the most generous and flexible documents on refugee protection."<sup>71</sup> Moreover, for the purposes of determining refugee status, the UNHCR has adopted a wider refugee definition based on the OAU Refugee Convention and the Cartagena Declaration—rather than based exclusively on the UN Refugee Convention, extending its mandate to forced displacements resulting from conflict, indiscriminate violence, or public disorder.<sup>72</sup>

Finally, the influence of the OAU's expanded definition can be seen through its incorporation into domestic legislation of countries. Within Africa, Kenya, Malawi, Nigeria, and South Africa are examples of countries that have incorporated the definition in their national refugee laws.<sup>73</sup> Outside Africa, some countries in Central America have also indirectly incorporated the OAU definition.<sup>74</sup>

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note 53, at 94; see also Sharpe, *Organization of African Unity and African Union Engagement with Refugee Protection: 1963–2011*, *supra* note 49, at 68.

71. See Press Release, UNHCR, UN High Commissioner for Refugees Lauds Africa Refugee Convention, at 40, for Saving Millions of Lives (June 18, 2014), <http://www.unhcr.org/en-us/news/press/2014/6/53a17e159/un-high-commissioner-refugees-lauds-africa-refugee-convention-40-saving.html>.

72. See Marina Sharpe, *The 1969 OAU Refugee Convention and the Protection of People fleeing Armed Conflict and Other Situations of Violence in the Context of Individual Refugee Status Determination*, 15–16, 18, DIVISION OF INTERNATIONAL PROTECTION: UNHCR, U.N. Doc. PPLA/2013/01 (Jan. 2013) (citing UNHCR, *MM (Iran) v. Secretary of State for the Home Department—Written Submission on Behalf of the United Nations High Commissioner for Refugees*, 3 August 2010, C5/2009/2479, ¶ 10, <http://www.unhcr.org/refworld/docid/4c6aa7db2.html>).

73. See, e.g., The Refugee Act (2006) Cap. 13 § 3 (Kenya); The Refugee Act (1989) art. 2 (Malawi); Refugees Act (1989) Cap. (N21 LFN 2004) § 20 (Nigeria); Refugees Act of 1998 § 3, GN 402 of GG 19544 (20 Nov. 1998) (S. Afr.). With 46 ratifications, the OAU Refugee Convention has the third largest number of parties of any OAU or AU treaty, after the AU Constitutive Act and the African Charter on Human and Peoples' Rights. For the current ratification status of all OAU and AU treaties, see AFRICAN UNION, *OAU/AU Treaties, Conventions, Protocols & Charters*, *supra* note 20. Note that those state parties that have not specifically incorporated the OAU Refugee Convention's expanded definition into their domestic legislation are still bound by it as a treaty obligation.

74. The primary example is Belize. See Refugees Act (1991), BLZ-1991-L-26628 (Belize). Mexico initially incorporated, by general reference, the Cartagena Declaration on Refugees into its domestic law through the decree of July 17, 1990, thereby indirectly adopting the Declaration's expanded refugee definition, which is in turn based on the OAU Refugee Convention's definition. See generally Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico, and Panama, held in Carta-

## 2. The Principle of *Non-Refoulement*

The principle of *non-refoulement* prohibits States from returning a refugee to territories where the refugee's life or freedom may be threatened on account of her race, religion, nationality, or membership in a particular social group or political opinion. *Non-refoulement* is enshrined in article 33 of the UN Refugee Convention,<sup>75</sup> and it is widely recognized as the cornerstone of international refugee protection.<sup>76</sup> The OAU Refugee Convention not only strengthens the institution of asylum, it also strengthens the principle of *non-refoulement*.

The OAU's formulation of the principle in article II(3) of the OAU Refugee Convention draws on article 3(1) of the UN Declaration on Territo-

gena, Colombia, Nov. 22, 1984 [hereinafter Cartagena Declaration]; Jean-François Durieux, *Capturing the Central American Refugee Phenomenon: Refugee Law-Making in Mexico and Belize*, 4 INT'L J. REFUGEE L. 301 (1992). In 2010, Mexico's National Assembly adopted new legislation, drafted with the technical support of UNHCR, called the Law on Refugees, Complementary Protection, and Political Asylum. It was signed into law on December 26, 2011. Article 13 of this law specifically incorporates the broader refugee definition and the protections provided for asylum seekers in the Cartagena Declaration using the language of the Declaration. Ley Sobre Refugiados, Protección Complementaria y Asilo Político art. 13, Diario Oficial de la Federación [DOF] 27-01-2011, última reforma DOF 30-10-2014 (Mex.), <http://www.ordenjuridico.gob.mx/Documentos/Federal/pdf/wo57819.pdf>.

75. UN Refugee Convention, *supra* note 15, art. 33. Article 33 provides:

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

76. *See generally* CORNELIS WOUTERS, INTERNATIONAL LEGAL STANDARDS FOR THE PROTECTION FROM REFOULEMENT 133–86 (2009) (discussing the character and contents of state obligations deriving from the prohibition on *refoulement* under article 33 of the UN Refugee Convention); Elihu Lauterpacht and Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 87, 107 (Erika Feller et al. eds., 2003) (discussing the scope of *non-refoulement*, the contexts in which it is relevant, and the interpretation of article 33 of the UN Refugee Convention in three respects: who is bound, what is prohibited, and who is protected). Apart from the UN Refugee Convention, *supra* note 15, and the OAU Refugee Convention, *supra* note 15, the principle of *non-refoulement* is also enshrined in some human rights treaties. *See* Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85; International Convention for the Protection of All Persons from Enforced Disappearance art. 16, Dec. 20, 2006, 2716 U.N.T.S. 3; International Covenant on Civil and Political Rights art. 7, Dec. 19, 1966, 999 U.N.T.S. 171; CRC, *supra* note 15, arts. 6, 37.

rial Asylum,<sup>77</sup> which provides that “[n]o person referred to in article 1, paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution.”<sup>78</sup> For its part, article II(3) of the OAU Refugee Convention provides:

No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for reasons set out in Article I, paragraphs 1 and 2.<sup>79</sup>

Though the OAU Refugee Convention, like its UN counterpart, still allows expulsion, or *refoulement*, in limited circumstances,<sup>80</sup> there are four main reasons that scholars believe the OAU Refugee Convention strengthens the principle of *non-refoulement*. First, the OAU Refugee Convention describes the people to whom *non-refoulement* applies as “persons” and not “refugees.”<sup>81</sup> Unlike under article 33(1) of the UN Refugee Convention, refugee status is not required to be protected from *non-refoulement* under the

77. The Declaration on Territorial Asylum was adopted by the General Assembly on Dec. 14, 1967 by Resolution 2312 (XXII). The Declaration was not formally intended to expand or interpret the UN Refugee Convention as such, since a binding treaty cannot be amended or interpreted by a non-binding declaration. Still, the deliberations leading to the adoption of the Declaration focused on the principle of *non-refoulement*, understood as the core of the Declaration, and the range of acceptable exceptions to the principle. The Declaration had an impact on subsequent normative developments in international refugee law. It may be noted that paragraphs 2, 3, 4, and 5 of article II of the OAU Refugee Convention are *pari materia* with the Declaration. Consequently, what were previously mere recommendations in the Declaration now constitute binding legal obligations among the state parties to the OAU Refugee Convention. Moreover, even as a nonbinding declaration of the General Assembly, it may have contributed to the emerging international consensus and practice that led to the crystallization of the principle of *non-refoulement* as customary international law. See generally P. Weiss, *The United Nations Declaration on Territorial Asylum*, 7 CAN. Y.B. INT’L L. 92 (1969) (discussing the legislative history, objectives and potential impact of the Declaration on normative developments for institution of asylum).

78. Declaration on Territorial Asylum, *supra* note 77, art. 3(1).

79. OAU Refugee Convention, *supra* note 15, art. II(3).

80. Rose M. D’Sa, *The African Refugee Problem: Relevant International Conventions and Recent Activities of the Organization of African Unity*, 31 NETH. INT’L L. REV. 378, 388 (1984). Note that under the OAU Refugee Convention, refugees who otherwise enjoy the protection of *non-refoulement* could still face *refoulement* (or expulsion) if, for example, they can no longer, because the circumstances under which they were recognized as refugees have ceased to exist, continue to refuse to avail themselves of the protection of the country of their nationality; they have committed serious non-political crimes outside their countries of refuge after being granted refugee status; or they have seriously infringed the purposes and objectives of the Convention. See OAU Refugee Convention, *supra* note 15, art. I(4)(e), (f), and (g).

81. W. J. E. M. van Hövell tot Westerflier, *Africa and Refugees: The OAU Refugee Convention in Theory and Practice*, 7 NETH. Q. HUM. RTS. 172, 176 (1989).

OAU Refugee Convention.<sup>82</sup> Second, the OAU Refugee Convention expands *non-refoulement* because it does not provide states with a national security exception to its application, as article 33(2) of the UN Refugee Convention does.<sup>83</sup> This may be because its humanitarian object militates in favor of progressive interpretation.<sup>84</sup> A third, somewhat subtle, difference is that article 33(1) of the UN Refugee Convention prohibits return to territories where *life or freedom* would be threatened, while article II(3) of the OAU Refugee Convention prohibits return to territories where *life, physical integrity, and liberty* would be threatened. Arguably, a prohibition on return in the face of threats to physical integrity provides a wider ambit of protection than a prohibition on return in the face of threats to life alone.<sup>85</sup> Additionally, Georges Abi-Saab has argued that the OAU Refugee Convention is the only binding international instrument that explicitly extends the principle of *non-refoulement* to rejection at the frontier, following the General Assembly Declaration on Territorial Asylum.<sup>86</sup>

But the notion that the OAU Refugee Convention expands the principle of *non-refoulement* needs to be taken with a couple of caveats. As Guy Goodwin-Gill and Jane McAdam argue, even under the UN Refugee Convention, *non-refoulement* applies equally to asylum seekers and refugees, “at least during an initial period and in appropriate circumstances, for otherwise there would be no effective protection.”<sup>87</sup> Further, while it is true that

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82. Marina Sharpe, *African Union Refugee Definition*, REFUGEE LEGAL AID: RIGHTS IN EXILE PROGRAMME, <http://www.refugeelaidinformation.org/african-union-refugee-definition#sthash.vVieaCap.pdf> (last visited Jan. 7, 2020).

83. Article 33(2) of the UN Refugee Convention reads:

The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

UN Refugee Convention, *supra* note 15, art. 33(2).

84. See Georges Abi-Saab, *The Admission and Expulsion of Refugees with Special Reference to Africa*, 8 AFR. Y.B. INT'L L. 71, 89–91 (2000); Arboleda, *Refugee Definition in Africa and Latin America: The Lessons of Pragmatism*, *supra* note 50, at 185 (discussing how the OAU Convention adapted a refugee definition to conform with the tenets of humanitarianism, as well as dictates of pragmatism, driven by the reality and consequences of regional conflicts).

85. Onayemi & Elias, *supra* note 8, at 597.

86. Abi-Saab, *supra* note 84.

87. GUY GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 132 (3d ed. 2007). Recall that a refugee is someone who factually fulfils the requirements of the refugee definition set out in the UN Refugee Convention (art 1.A(2)) or the OAU Refugee Convention (art. I(2)), as the case may be: Once the definition's requirements are fulfilled, a person has refugee status, and protection from *refoulement*, with no additional action required from the host state. In a relevant dictum in his judgment in *Hirsi Jamaa v. Italy*, Judge Pinto de Albuquerque of the European Court of Human Rights emphasized the fact that a person

the OAU Refugee Convention does not include a national security exception, sections (f) and (g) of its article I(4) retract application of the Convention—and thus the protection of *non-refoulement*—from persons who have committed a serious non-political crime outside the country of refuge after admission as a refugee or who seriously infringe upon the convention’s purposes and objectives.<sup>88</sup> In this sense, therefore, the OAU Refugee Convention’s expanded principle of *non-refoulement* is not as absolute as some scholars make it out to be.<sup>89</sup>

### 3. The Individual Right to Asylum: Myth or Reality?

It is widely acknowledged that the UN Refugee Convention does not establish an individual’s right to asylum and that no other international instrument of universal scope recognizes such a right.<sup>90</sup> The UN Refugee Convention lays out an obligation upon the States Parties not to return asylum-seekers admitted to their territories to places where their lives or freedom may be in danger (the principle of *non-refoulement* discussed above), but it does not oblige them to *admit* refugees. Beyond *non-refoulement*, states have a duty only to grant access to asylum procedures to asylum-seekers.<sup>91</sup> That said, the right of an individual suffering persecution to *seek*

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becomes a refugee upon fulfilling the factual elements of the refugee definition and not because of prior recognition by the state authorities. *See Hirsi Jamaa v. Italy* [GC], No. 27765/09, ECHR 2012, at 63 (“A person does not become a refugee because of recognition, but is recognised because he or she is a refugee.”). When a refugee applies for the rights and protections of asylum in a host state, she becomes an asylum seeker, and awaits that state’s evaluation of her claim to refugee status *in that state*. Thus, a person who otherwise qualifies as a refugee may still be denied asylum by the state since there is no obligation upon the state to grant asylum to any individual as right (see discussion *infra* II.B.3). However, the state must protect the individual from *refoulement*.

88. *See supra* notes 66, 80.

89. *See, e.g.*, Rachel Murray, *Refugees and Internally Displaced Persons and Human Rights: The African System*, 24 REFUGEE SURV. Q. 56, 57 (2005).

90. The argument that the individual possesses a right to asylum, which the state must grant as a matter of duty, has a long history. *See* HUGO GROTIUS, ON THE LAW OF WAR AND PEACE 218 (Stephen C. Neff ed., 2012) (arguing that the right to asylum is a natural right open to victims of unmerited persecution and that states have a corresponding duty to grant asylum).

91. The view that the UN Refugee Convention and its 1967 Protocol do not provide a right to be asylum (just to pursue an application for asylum) is shared by most scholars and writers and has not been seriously challenged. *See, e.g.*, David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1255 (1990) (noting that classically the right to asylum under international law belonged to the states and not to individuals); *see also* Roman Boed, *The State of the Right of Asylum in International Law*, 5 DUKE J. COMP. & INT’L L. 1, 11 (1994) (discussing the three distinct “rights” falling under the umbrella of the “right to asylum”: (i) the right of a state to grant asylum; (ii) the right of an individual to seek asylum; and (iii) the right of an individual to be granted asylum,

asylum is not controversial, nor open to debate, since it is an aspect of the right of the individual to leave any country, including one's own.<sup>92</sup>

The UN General Assembly adopted the UN Refugee Convention three years after the adoption of the Universal Declaration of Human Rights ("UDHR") in 1948.<sup>93</sup> Article 14(1) of the UDHR provides for the right of individuals to seek and enjoy asylum, but it does not positively oblige states to provide that asylum. This appears to have been a deliberate compromise. Recalling the legislative history of article 14(1), Roman Boed has noted that

[t]he drafting history of Article 14(1) . . . reveals that the drafters of the Declaration contemplated—but ultimately declined to adopt—any significant innovation in the law of asylum. The original draft of Article 14 provided that, "[e]veryone has the right to seek *and to be granted*, in other countries, asylum from persecution." This generous provision would have vested individuals with the right to asylum vis-à-vis the state of refuge.<sup>94</sup>

Some sixteen years after the adoption of the UN Refugee Convention, when the General Assembly adopted the Declaration on Territorial Asylum, it still did not recognize an individual right to asylum.<sup>95</sup> No other UN instrument has codified the right. Consequently, Goodwin-Gill and McAdam, among the leading authorities on the subject, have reached the categorical and widely shared conclusion that, based on state practice, there is no right of asylum.<sup>96</sup> Nevertheless, there is a case for a right to asylum on the basis that asylum is, as Ousmane Goundiam, put it, "the first and most fundamen-

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and arguing that currently no international instrument establishes a legal duty for states to admit asylum-seekers or a right of individuals to be granted asylum).

92. The right to return to one's country after time away is an aspect of freedom of movement and is expressed in various international human rights instruments. The Universal Declaration of Human Rights provides for this right in its article 13(2) ("Everyone has a right to leave any country, including his own, and to return to his country."). Other international instruments that articulate this right include the International Covenant on Civil and Political Rights art. 12(2), Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); the International Convention on the Protection of All Migrant Workers and Members of Their Families art. 8, Dec. 18, 1990, 2220 U.N.T.S. 3 (entered into force July 1, 2003); and the African Charter on Human and Peoples' Rights art. 12(2).

93. G.A. Res. 217 (III)A (Dec. 10, 1948).

94. Boed, *supra* note 91, at 9. (emphasis in the original) (internal citation omitted).

95. G.A. Res. 2312 (XXII) (Dec. 14, 1967).

96. GOODWIN-GILL & MCADAM, *supra* note 87, at 132; *see also* Maria-Teresa Gil-Bazo, *Refugee Status, Subsidiary Protection, and the Right to Be Granted Asylum Under EC Law 7* (UNHCR New Issues in Refugee Research, Research Paper No. 136, 2006); Maria-Teresa Gil-Bazo, *Asylum as a General Principle of International Law*, 27 INT'L J. REFUGEE L. 3, 5–6 (2015).

tal of the refugee's needs and to grant him this constitutes the preliminary condition for him to have all the other rights."<sup>97</sup>

The OAU Refugee Convention does not depart from the UN Refugee Convention's standard—that the so-called right to asylum is really *the right of refugees to petition states to grant them asylum* if the states wish to do so, as an exercise of their sovereign choice and subject to the satisfaction of other conditions, including other applicable treaty obligations. Article II(1) of the OAU Refugee Convention provides that

Member States of the OAU shall use their best endeavors consistent with their respective legislation 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.<sup>98</sup>

In essence, the OAU Refugee Convention merely urges states to grant asylum but does not create a right enforceable by the individual against the state. Indeed, the appeal to states to “[use] their best endeavors” suggests that the OAU Refugee Convention merely grants a permissive right to the state rather than a positive, enforceable right on the part of the individual. This explains Abdulqawi Yusuf's observation that the OAU Refugee Convention “strengthens the institution of asylum and broadens the scope of the 1951 Convention in this respect by providing for the ‘right to grant asylum’”—as opposed to providing individuals with the right to be *granted* asylum. Rainer Hofmann makes a similar observation.<sup>100</sup>

While not enshrining a positive individual right to asylum, the OAU Refugee Convention uniquely characterizes the grant of asylum as a “peaceful and humanitarian act” that “shall not be regarded as an unfriendly act by any Member State.”<sup>101</sup> Accordingly, most African states have generally respected this peaceful and humanitarian character of asylum, even if their levels of refugee protection in recent years have declined due to lack of, or limited, resources and other challenges. While in practical terms this may not be different from the treatment extended under the UN Refugee Convention, the explicit inclusion of this element in the OAU Refugee Convention provides an additional consideration to states' treatment of asylum seekers.

Further, where the OAU Refugee Convention makes modest headway, the later African Charter is more ambitious. The first, and, so far, only, international instrument to enshrine an individual right to asylum is the Afri-

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97. See Goundiam, *supra* note 68, at 9.

98. OAU Refugee Convention, *supra* note 15, art. II(1).

99. Yusuf, *supra* note 19, at 513, 518.

100. See Hofmann, *supra* note 68, at 324.

101. *Id.*

can Charter.<sup>102</sup> Article 12(3) of the African Charter provides that “[e]very individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.”<sup>103</sup> The African Charter’s right “to seek *and obtain*” asylum appears to deliberately incorporate the language that was rejected by the drafters of article 14(1) of the UDHR (the right “to seek *and be granted*” asylum).<sup>104</sup>

Yet, a right to “obtain” asylum remains untenable. As noted earlier, there is no corresponding obligation under general international law for states to admit refugees, and states’ discretion in this regard has not been questioned or diminished by the UDHR, the UN Refugee Convention, or subsequent international instruments. Article 12(3) of the African Charter itself recognizes the limitations of the right to seek and obtain asylum, which is subject to the “laws of those [host] countries and international conventions.” Subsequent African state practice—public statements made on behalf of states, official publications, administrative and legislative acts, decisions of national courts and administrative agencies dealing with refugee and asylum matters—suggests that the grant of asylum remains within the exclusive discretion of states. In Africa, as in most other parts of the world,

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102. Outside the African regional refugee regime, a limited right to asylum has evolved under the European Convention on Human Rights for persons subject to deportation or extradition proceedings in countries that are parties to that Convention. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights] (entered into force Sept. 3, 1953); see David Scott Nance, *The Individual Right to Asylum Under Article 3 of the European Convention on Human Rights*, 3 MICH. J. INT’L L. 477 (1982) (discussing the emergence of a variant of the individual right to be granted asylum, albeit under limited conditions, through the doctrine of non-deportation, in a series of decisions by the European Commission of Human Rights beginning in 1961). The European Convention’s right to asylum is only available when (a) the applicant is to be deported to a country known for its denial of human rights, for example “where he or she clearly will be subjected to inhuman or degrading treatment,” Nance, at 483; and (b) the circumstances relating to the applicant be “exceptional,” *i.e.*, where the Commission comes to the conclusion that there are “serious reasons to believe that the person concerned will be subjected, in the State to which he is to be sent, to treatment which is in violation of this Article (3).” *Id.* at 484. Nance’s reading of the doctrine of non-deportation under article 3 of the European Convention is that it diverges from what might be expected of a full-fledged right of asylum in two senses: First, it can arise only in situations in which the individual has already entered the country in which he or she seeks asylum, and, second, it depends not on the conditions from which an individual has fled, but on the anticipated treatment the individual will be subjected to if returned to the country of origin. *Id.* at 484–88. As he puts it: “The reprieve from deportation depends on the standard of ‘inhuman or degrading’ treatment, a standard which may not be entirely coterminous with or as favorable toward applicants as the related standard of persecution that governs determinations of refugee status under the 1951 Convention relating to the Status of Refugees.” *Id.* at 488.

103. African Charter, *supra* note 17, at 248.

104. Boed, *supra* note 91; see also ALBERT VERDOODT, *NAISSANCE ET SIGNIFICATION DE LA DECLARATION UNIVERSELLE DES DROITS DE L’HOMME* 155–56 (1964).

asylum applications are routinely dealt with administratively, and only a few of them—mostly adverse decisions—reach the courts for judicial review. As a result, there is a paucity of refugee jurisprudence in most of these countries.<sup>105</sup> Equally, there is little published research examining the outcomes of asylum application decisions in these countries. However, the few studies and surveys of decisions that do exist support the conclusion that in all these countries the grant of asylum remains within the exclusive discretion of states. Moreover, the African states that have enacted national legislation on refugees have incorporated the restrictive provisions on the right to asylum as formulated in the UN Refugee Convention and OAU Refugee Convention.<sup>106</sup> As regards international jurisprudence, so far there has been only one case concerning asylum before the African Commission on Human and Peoples Rights (“African Commission”), and none yet before the African Court on Human and Peoples’ Rights. In that case, *Organisation Mondiale Contre la Torture v. Rwanda*, the African Commission recognized only the “seek” component of article 12(3)’s “seek and obtain asylum,” stating that article 12(3) “should be read as including a general protection of all

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105. A notable exception is South Africa, where there has been a significant amount of litigation over refugee claims and asylum applications since the country acceded to the OAU Refugee Convention and UN Refugee Convention in December 1995 and January 1996, respectively, enacting its Refugees Act of 1998 to implement the two conventions. See Anton Katz & Tiyanjana Maluwa, *Refugees and Stateless Persons*, in JOHN DUGARD, MAX DU PLESSIS, TIYANJANA MALUWA & DIRE TLADI, *DUGARD’S INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE* 502–38 (5th ed. 2019) (discussing the legal regime for refugee protection in South Africa and analyzing judicial decisions on asylum applications); see also Roni Amit, *No Refuge: Flawed Status Determination and the Failures of South Africa’s Refugee System to Provide Protection*, 23 INT’L J. REFUGEE L. 458 (2011) (providing an analysis of South African refugee cases); Bonaventure Rutinwa, *The End of Asylum? The Changing Nature of Refugee Politics in Africa* 18 (UNHCR New Issues in Refugee Research, Working Paper No. 5, 1999) (examining the asylum policies of African countries in two periods and the factors influencing the changes in refugee policy and practice: the first period, the era of the “open door” policy, which was an era of openness towards forced migrants, the majority of whom came from countries still fighting against colonialism and racist regimes; and the second period, from the late 1980s and early 1990s, when the openness towards refugees declined and host countries became more restrictive and emphasized the grant of asylum as lying within the exclusive discretion of the state).

106. The majority of African states enacted refugee legislation of one kind or another after the entry into force of the OAU Refugee Convention. These include (with year of adoption of the legislation): Angola (1990), Benin (1975), Burkina Faso (1997), Burundi (2009), Cameroon (2005), the Democratic Republic of Congo (2002), Djibouti (2001), Eswatini (1978), Gabon (1996), Gambia (2008), Ghana (1993), Guinea (2000), Kenya (2006), Lesotho (1985), Liberia (1994), Malawi (1989), Mali (1998), Mauritania (2005), Mozambique (1991), Namibia (1999), Niger (1997), Nigeria (1989), Rwanda (2006), Senegal (1976), Sierra Leone (1984), South Africa (1998), Sudan (1974), Tanzania (1999), Togo (2000), Uganda (2006), and Zimbabwe (1983).

those who are subject to persecution, that they may *seek* refuge in another state.”<sup>107</sup>

#### 4. Burden-Sharing, Temporary Protection, and Voluntary Repatriation, and Application to All OAU Member States

Four other, inter-related normative innovations in the international refugee law regime merit brief mention here. First, article II(4) of the OAU Refugee Convention introduced the world to the concept of burden-sharing.<sup>108</sup> Burden-sharing in this context includes regional resettlement of refugees, financial support, and shared political responsibility. Under article II(4) of the OAU Refugee Convention, if a country of first entry finds it difficult to grant asylum, it may appeal to other Member States to assist it in granting asylum, “and such other Member States shall in the spirit of African solidarity and international cooperation take appropriate measures to lighten the burden of the Member State granting asylum”—hopefully reducing the number of asylum-seekers returned to the territories from which they have fled.<sup>109</sup>

The apogee of burden-sharing occurred during the 1970s and 1980s, with the influx of refugees from apartheid South Africa and other southern African countries still engaged in national liberation struggles. Although most of these refugees sought asylum in neighboring independent states within the southern African region (such as Botswana, Lesotho, Swaziland, and Zambia), other states farther afield, including Tanzania in East Africa and Nigeria in West Africa, took in their share of these refugees and provided financial and material assistance as well.<sup>110</sup> Because of this mass migration, following the entry into force of the OAU Refugee Convention in 1974, the OAU established the Refugees, Displaced Persons and Humanitarian Affairs Division as a unit within the OAU General Secretariat with the responsibility of coordinating the organization’s policies with Member States on this and other issues.<sup>111</sup>

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107. Organisation Mondiale Contre la Torture v. Rwanda, Communication 27/89-46/90-49/91-99/93, African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.], ¶ 31 (Oct. 1996), <https://www.refworld.org/cases,ACHPR,51b6f4374.html> (emphasis added).

108. Sharpe, *supra* note 68, at 107 (describing the Convention’s approach as “a very early form of burden-sharing”).

109. OAU Refugee Convention, *supra* note 15, art. II(4).

110. See Rwelamira, *supra* note 68, at 157–59 (referencing some examples of the countries that bore the burden of hosting refugees fleeing from anti-colonial conflicts and internal conflicts in independent countries).

111. See OAU Council of Ministers, Resolution on the Bureau for the Placement and Education of African Refugees, CM/Res. 346 (XXIII) (June 6–11, 1974); see also Marina Sharpe, *Engaging with Refugee Protection? The Organization of African Unity and African Union Since 1963* (UNHCR New Issues in Refugee Research, Research Paper No. 226, 2011) (discussing the legislative history of the Bureau for the Placement and Education of African

However, in recent times, burden-sharing has been constrained in practice by the limited resources of the African States.<sup>112</sup> A contemporary situation that presents a challenge to the principle of burden-sharing is the refugee flow from the conflict in South Sudan, Africa's newest country, into neighboring east African countries. As was acknowledged in a statement by the UNHCR in 2017, eight months after fresh violence erupted in South Sudan, a famine produced by the vicious combination of fighting and drought was driving what was the world's fastest growing refugee crisis.<sup>113</sup> Estimates of people displaced from South Sudan into the surrounding states in the last two and a half years stand at about 1.6 million, with almost half of these persons crossing into the northern part of Uganda and the rest fleeing into Sudan, Ethiopia, Kenya, Democratic Republic of the Congo, and the Central African Republic.<sup>114</sup> This alarming rate of displacement not only represents an impossible burden on a region that is significantly poor—and which relies on external resources to cope with the problem, but it also erases any possibility of implementing among these states the principle of burden-sharing provided for in the OAU Refugee Convention.<sup>115</sup>

Second, there is the notion of so-called “temporary protection” provided for in the OAU Refugee Convention's article II(5), which provides:

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 pending

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Refugees, which was integrated into the OAU General Secretariat as the Refugees, Displaced Persons and Humanitarian Affairs Division). The restructuring of the Bureau in 1974 also included formalizing the role of the OAU's Liberation Committee, which was responsible for coordinating the OAU's support for the various national liberation movements in Southern Africa that were providing humanitarian assistance to refugees fleeing the apartheid and minority-ruled colonial regimes in the region.

112. See Jean-Francois Durieux & Agnès Hurwitz, *How Many Is Too Many? African and European Legal Responses to Mass Influx of Refugees*, 47 GERMAN Y.B. INT'L L. 105, 128–29 (2004). The issue of financial constraints as a critical factor in the demand for burden-sharing and responsibility-sharing in international refugee protection was at the heart of discussions during the first-ever UN General Assembly High-Level Summit on Addressing Large Movements of Refugees and Migrants held on September 19, 2016 in New York. See Volker Türk & Madeline Garlick, *From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees*, 28 INT'L J. REFUGEE L. 656, 662 (2016) (discussing regional responsibility-sharing, including the African regional scheme).

113. Press Release, UNHCR, South Sudan's Refugee Crisis Now the World's Fastest Growing, Uganda and Region in Critical Need of Help (Mar. 17, 2017), <https://www.unhcr.org/news/briefing/2017/3/58cba77f4/south-sudan-refugee-crisis-worlds-fastest-growing-uganda-region-critical.html>.

114. *Id.*

115. *Id.*

arrangement for his resettlement in accordance with the preceding paragraph.<sup>116</sup>

At first reading, this provision seems to imply only temporary protection of a limited nature.<sup>117</sup> In my view, a more correct interpretation is that the provision is intended to apply to persons who have been recognized as refugees but for one reason or another have not been granted the right of residence for any duration at all. Thus, the OAU Refugee Convention does not operate to limit state obligations towards refugees. Rather it spreads the obligations across states, so that when a person recognized as a refugee and granted asylum in one African country is resettled in another African country, the resettlement simply continues her grant of asylum in the new country. This remedies situations in which a refugee may have been granted asylum but not an accompanying right of residence. It is the refugee's *residence in the first country* that is temporary, and not the refugee status and protection itself. There is thus a close link between temporary protection and burden-sharing. But temporary protection need not mean limited protection.

The third innovation is voluntary repatriation, which is rendered more explicitly in the OAU Refugee Convention than in the UN Refugee Convention. The OAU Refugee Convention explicitly enshrines voluntary repatriation in its article V(1), which provides that "the essentially voluntary nature of repatriation shall be respected in all cases and no refugee shall be repatriated against his will." Voluntary repatriation is in essence an element of *non-refoulement*. The explicit prohibition on forced repatriation in this provision has been described as "a powerful statement of principle" and as an early expression of what has since become "the cornerstone of the international regime for refugee protection."<sup>118</sup>

Despite this trailblazing language and the conforming behavior of most African states, instances of forced repatriation or expulsions of refugees have occasionally punctuated intra-African political relations. In some cases, while officially committing themselves to only voluntary repatriation, governments have simultaneously carried out forced ejections of refugees under the pretext of security concerns, as happened in 1993 when the Kenyan government forcibly repatriated over one thousand Somali refugees

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116. OAU Refugee Convention, *supra* note 15, art. II(5).

117. See Bonaventure Rutinwa, *Prima Facie Status and Refugee Protection* 16 (UNHCR New Issues in Refugee Research, Working Paper No. 69, 2000), <http://www.unhcr.org/3db9636c4.html>.

118. See Durieux & Hurwitz, *supra* note 112, at 130. It is significant that subsequent state practice outside Africa has followed this principle. See, e.g., Bilateral Agreement on the Voluntary Return of Refugees art. III, Afg.-Pak., Apr. 14, 1988, 27 I.L.M. 585.

from Kenyan refugee camps.<sup>119</sup> In other cases, as with Angolan refugees in Namibia, and Rwandans in Zimbabwe, refugees were reclassified as “illegal immigrants” and thus subject to exclusion from refugee status, enabling *refoulement* and expulsion.<sup>120</sup> This was also the justification for the forced repatriation of over 5,000 Rwandan refugees from Tanzania in 2006, despite the fact that most of them had previously been recognized as refugees or been naturalized.<sup>121</sup> In addition, on other occasions host states “voluntarily” returned refugees after creating conditions that left the refugees with no option but to give up their refugee status and return to their countries of origin. For example, as Bonaventure Rutinwa has observed, in the early 1980s, Uganda’s government under president Milton Obote displaced a large number of people of Rwandan origin, including some 40,000 who had claimed Ugandan citizenship and 31,000 registered with UNHCR as refugees, forcing them to repatriate to Rwanda.<sup>122</sup> Similarly, Sudanese refugees were forced to leave because they were denied food in the Ugandan camps harboring them.<sup>123</sup> This has led one observer to claim that voluntary repatriation is a principle honored more in its breach than in observance in Africa.<sup>124</sup> While there is some truth in this claim, reflecting a declining commitment to asylum and refugee protection in some countries, compliance with the obligation set out in article V(I) of the OAU Refugee Convention remains the rule rather than the exception.<sup>125</sup>

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119. See UNHCR, *THE STATE OF THE WORLD’S REFUGEES* 56 (1993); JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 283 (2005).

120. See HATHAWAY, *supra* note 119, at 284–85.

121. Earlier, in 1980, Tanzania had naturalized about 36,000 Rwandan refugees who had been living in the country for several years, in some cases for generations. See Aderanti Adepoju, *Refugees in Africa: Problems and Prospects* 11, presented at SYMPOSIUM ON ASSISTANCE TO REFUGEES: ALTERNATIVE VIEWPOINTS (Mar. 27–31, 1984).

122. Bonaventure Rutinwa, *The End of Asylum? The Changing Nature of Refugee Politics in Africa* 18 (UNHCR New Issues in Refugee Research, Working Paper No. 5, 1999).

123. See HATHAWAY, *supra* note 120, at 288–89 (citing the case of 1000 Sudanese refugees who returned home because they were starving in Ugandan camps). More recent threats to forcibly expel refugees include those by the Kenyan government in respect of Somali refugees on account of security concerns (May 2016) and by the Ugandan government with respect to Burundian refugees following a claim by Burundian authorities that the country was safe after months of civil unrest (Feb. 2017). Both the Kenyan and Ugandan governments subsequently retreated and neither threat was carried out.

124. Cristiano d’Orsi, *Sub-Saharan Africa: Is a New Special Regional Refugee Law Regime Emerging?*, 68 HEIDELBERG J. INT’L L. 1057, 1058 (2008).

125. There are more cases of African refugee-hosting countries that have not sought to expel or forcibly return legally admitted or recognized refugees from their territories than there are reported cases of involuntary repatriation. Malawi, perennially one of the poorest countries in Africa, offers an example of the resilience of African countries in hosting refugees on their territories and refusing to forcibly repatriate them, even in the face of dire poverty. See Robert T. Huffman, *Repatriation of Refugees from Malawi to Mozambique*, 39 AFR. TODAY 114 (1992); Tiyanjana Maluwa, *Human Rights and Refugees in Southern Africa*:

Finally, there is one remarkable feature of the OAU Refugee Convention to which commentators have not generally drawn attention. It is that the key principles articulated in the treaty, for example regarding asylum (article II(1)), *non-refoulement* (article II(3)), burden-sharing (article II(4)), and non-discrimination (article IV), are addressed to “OAU Member States,” broadly, and not specifically or restrictively to “States Parties” or “Signatory States,” although the latter terms are used in other provisions of the Convention.<sup>126</sup> I argue that the use of a variety of terms was not accidental, but a deliberate choice by the drafters. This choice likely was driven by the optimistic belief at the time that all OAU Member States would, in time and as a matter of course, become parties to a treaty governing a problem of such critical significance for the continent in the early days of the organization. While the drafters would have been aware that the obligations set out in the treaty would only bind the parties to it, there was probably a desire that all members of the organization embrace the new principles as a shared consensus on the protection of refugees in the new, postcolonial Africa. The fact that today the OAU Refugee Convention has the highest number of parties of all OAU treaties, next only to the AU Constitutive Act and the African Charter, is a fulfillment of the early desire of the OAU to expand the application of the treaty to all member states.

### 5. Overall Impact of the OAU Refugee Convention

Although the gap between law and practice—or between legal and practical protection under the Convention—in Africa is often wide,<sup>127</sup> the OAU Refugee Convention has had two major impacts on international legal developments and practice.

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*Some Perspectives on Recent Legislative Developments in Malawi*, 53 HEIDELBERG J. INT'L L. 88, 107 (1993) (“On an official level, Malawi’s preferred solution is that of the voluntary repatriation of the Mozambican refugees as and when conditions permit.”); see also James Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 126 (1997) (noting that Malawi’s willingness to shelter a population of 1.1 million Mozambican refugees, amounting to more than ten percent of its own population, between the early 1980s and 1992 was without parallel in the [Global] North).

126. See, e.g., article 3(2) providing that: “*Signatory States* undertake to prohibit refugees residing in their respective territories from attacking any *State Member* of the OAU, by any activity likely to cause tension between *Member States*, in particular by use of arms, through the press, or by radio.” (Emphasis added.) Similarly, article 6(1) provides: “Subject to Article III, *Member States* shall issue refugees lawfully staying in their territories travel documents in accordance with the United Nations Convention relating to the Status of Refugees and the Schedule and Annex thereto, for the purposes of travel outside their [territory].” (Emphasis added.) On the other hand, the provisions on temporary protection (art. 2(5)) and voluntary repatriation (art. 5) use the term “country of asylum.”

127. See Wood, *supra* note 52, at 579.

To begin with, the UNHCR, in the execution of its mandate in Africa, has employed refugee protection policies embedded in the UN Refugee Convention, the 1967 Protocol Relating to the Status of Refugees, and the OAU Refugee Convention. Of more global significance, the UNHCR's Executive Committee of the High Commissioner's Programme concluded that the definition of a refugee under the *UN Refugee Convention* should be broadened to take account of mass displacement, suggesting, without attribution, the exact wording of article I(2) of the OAU Refugee Convention.<sup>128</sup> Moreover, the OAU Refugee Convention has also guided the operations of other relevant UN agencies in Africa, such as the World Health Organization and World Food Programme.<sup>129</sup>

Secondly, although no other region has created a regional refugee treaty, the OAU Refugee Convention did provide the inspiration for a different regional instrument:<sup>130</sup> The Cartagena Declaration on Refugees, adopted in 1984 by ten Latin American countries to address the situation of refugees in the Central American region.<sup>131</sup> As already noted, article I(2) of the OAU

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128. Richard Greenfield, *The OAU and Africa's Refugees*, in *THE OAU AFTER TWENTY YEARS 209*, 224 (Yassin El-Ayouty & William Zartman eds., 1984); see also Sharpe, *The 1969 African Refugee Convention: Innovations, Misconceptions, and Omissions*, supra note 68, at 103.

129. See generally UN Secretary-General, *Rep. of the Secretary-General on Assistance to Refugees, Returnees and Displaced Persons*, U.N. Doc. A/65/324 (Aug. 24, 2010) (giving background on programs that provide assistance to refugees, returnees, and displaced persons in Africa, including the World Health Organization and World Food Programme).

130. See, e.g., Arboleda, *The Cartagena Declaration of 1984 and Its Similarities to the 1969 OAU Convention—A Comparative Perspective*, supra note 53, at 93 (acknowledging the influence of the OAU Refugee Convention on the Cartagena Declaration). Moreover, the Group of Latin American countries in the UN officially recognized the influence of the OAU Refugee Convention's definition in a submission to the Working Group on Solutions and Protection of the Executive Committee of the High Commissioner's Program in 1991. See *Rep. of the Working Group on Solutions and Protection to the Forty-Second Session of the Executive Committee of the High Commissioner's Programme*, ¶¶ 23–26, U.N. Doc. EC/SCP/64 (Aug. 12, 1991); see also *id.*, Annex II, Category 2 (“Persons covered by the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and by the Cartagena Declaration on Refugees (Submitted by the African and Latin American Groups)”).

131. The Cartagena Declaration was elaborated and adopted by delegates from the following countries: Belize, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, and Venezuela. U.N. High Commissioner for Refugees, *Cartagena Declaration on Refugees*, at 4–5 (Nov. 22, 1984). On the tenth anniversary of the Cartagena Declaration, the instrument was reaffirmed by the San José Declaration on Refugees and Displaced Persons, adopted by the International Colloquium in Commemoration of the “Tenth Anniversary of the Cartagena Declaration on Refugees” (Dec. 5–7, 1994), <https://www.refworld.org/docid/4a54bc3fd.html> [hereinafter San José Declaration]. The San Jose Declaration extends the scope of the application of the Cartagena Declaration to internally displaced persons. See *id.*, part III. The Colloquium was co-organized by UNHCR and the Inter-American Institute of Human Rights, under the auspices of the Government of Costa Rica. The following countries participated in the Colloquium: Argentina, Bahamas, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras,

Refugee Convention expands the UN Refugee Convention definition by adding 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.<sup>132</sup>

Article III(3) of the Cartagena Declaration adds to the elements contained in the 1951 Convention and the 1967 Protocol that the definition of a refugee includes “[persons] who have fled their country because their lives, security or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.” This definition in fact specifies more elements than that of the OAU. Although not a binding treaty, the Declaration has since been incorporated into the national law and state practice of sixteen countries.<sup>133</sup>

### C. *African Charter on Human and Peoples’ Rights (1981): Conceptualizing New Rights*

The African Charter<sup>134</sup> is a revolutionary legal instrument that has been the subject of much scholarly commentary and debate.<sup>135</sup> I will not recount

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Nicaragua, Panama, Peru, Dominican Republic, and Uruguay. The participation thus extended beyond the ten countries that adopted the Cartagena Declaration in 1984. At its eighth plenary session held on June 7, 1996, the General Assembly of the Organization of American States took note of the principles contained in the conclusions and recommendations of the San Jose Declaration and urged member states to consider those principles with a view to incorporating them, as appropriate, into their respective national legislations. Resolution on Situation of Refugees, Returnees, and Displaced Persons in the Hemisphere, AG/RES. 1416 (XXVI-0/96), June 7, 1996.

132. *Supra* note 15, OAU Refugee Convention art. I(2).

133. These countries are: Argentina, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru, and Uruguay. Regional Legal Unit of the Bureau for the Americas, UNHCR, Regional Definition of Refugee (Cartagena): Latin American Countries That Have Incorporated It into Their National Legislation, [https://acnur.org/fileadmin/Documentos/Proteccion/Buenas\\_Practicas/11261.pdf](https://acnur.org/fileadmin/Documentos/Proteccion/Buenas_Practicas/11261.pdf) (last visited Jan. 7, 2020).

134. African Charter on Human and Peoples’ Rights, *supra* note 17. The African Charter is sometimes referred to as the “Banjul Charter,” after Banjul, the capital of the Gambia, where the two ministerial conferences that finalized the drafting process took place. However, the final draft was formally adopted by the eighteenth session of the Assembly of Heads of State and Government of the OAU in Nairobi, Kenya, on June 27, 1981.

135. Since its adoption in 1981, the African Charter has spawned a plethora of scholarly literature. Among the general commentaries are Daniel C. Turack, *The African Charter on Human and Peoples’ Rights: Some Preliminary Thoughts*, 17 AKRON L. REV. 365 (1982); U.

these debates here. For the purposes of this discussion, it suffices to highlight two areas that justify its characterization as a unique normative document: its articulation of the concept of “peoples’ rights” and of the right to development.

### 1. The Concept of Peoples’ Rights

First, in the field of international human rights law, the African Charter is celebrated, *inter alia*, for articulating the notion of “peoples’ rights” (or “collective rights”) as a distinct category of “human rights”—the former being a subset of the latter that is on equal footing with classical individual rights. What are peoples’ rights? The UN Charter first enunciated the concept of “equal rights and self-determination of peoples” in its article 1(2), but it gave no detail beyond this broad description.<sup>136</sup> The African Charter is the first and only international human rights instrument to articulate the notion of peoples’ rights in detail.<sup>137</sup>

The African Charter enumerates peoples’ rights in articles 19 to 24: First, the right of all people to equality, and the corresponding prohibition on the domination of one people by another (article 19). Second, the right to existence, encompassing the unquestionable and inalienable right to self-determination for all peoples—and, more specifically, the right of colonized or oppressed peoples to self-determination, including the right to receive assistance in their liberation struggle against foreign domination (article 20). Third, the right freely to dispose of wealth and natural resources (article 21).

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O. Umzurike, *The African Charter on Human and Peoples’ Rights*, 77 AM. J. INT’L L. 902 (1983); Richard Gittleman, *The African Charter on Human and Peoples’ Rights: A Legal Analysis*, 22 VA. J. INT’L L. 667 (1982); Stephen C. Neff, *Human Rights in Africa: Thoughts on the African Charter on Human and Peoples’ Rights in the Light of Case Law from Botswana, Lesotho and Swaziland*, 33 INT’L & COMP. L.Q. 331 (1984); B. Obinna Okere, *The Protection of Human Rights in Africa and the African Charter on Human and Peoples’ Rights: A Comparative Analysis with the European and American Systems*, 6 HUM. RTS. Q. 141 (1984); Rose M. D’Sa, *Human and Peoples’ Rights: Distinctive Features of the African Charter*, 29 J. AFR. L. 72 (1985); Nana K.A. Busia Jr., *The Political Economy of the African Charter on Human and Peoples’ Rights*, 7 NORDIC J. HUM. RTS. 68 (1989); Philip Amoah, *The African Charter on Human and Peoples’ Rights—An Effective Weapon for Human Rights?*, 4 AFR. J. INT’L & COMP. L. 226 (1992); Michelo Hansungule, *The African Charter on Human and Peoples’ Rights: A Critical Review*, 8 AFR. Y.B. INT’L L. 265 (2000); NASILA S. REMBE, *AFRICA AND REGIONAL PROTECTION OF HUMAN RIGHTS: A STUDY OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS: ITS EFFECTIVENESS AND IMPACT ON THE AFRICAN STATES* (1985). Subsequent book-length studies include U. O. UMOZURIKE, *THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS* (1997); VINCENT O. ORLU NMEHILLE, *THE AFRICAN HUMAN RIGHTS SYSTEM: ITS LAWS, PRACTICE AND INSTITUTIONS* (2001); and FATSAH OUGUERGOUZ, *THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS: A COMPREHENSIVE AGENDA FOR HUMAN DIGNITY AND SUSTAINABLE DEMOCRACY IN AFRICA* (2003).

136. U.N. Charter art. 1(2).

137. See, e.g., OUGUERGOUZ, *supra* note 135, at 203.

Fourth, and closely related, the right to economic, social, and cultural development (article 22). Fifth, the right to national and international peace and security (article 23). And, sixth, the right to a generally satisfactory environment favorable to their development (article 24).

Notice that the African Charter proclaims that “all peoples” may claim and enjoy the rights set out in articles 19 to 24. “Peoples” are thus the relevant right-holders, not individuals. Yet, the African Charter itself does not define the term “peoples” in this context. The task of deciphering this term—and the exact content of the rights specified in articles 19 to 24—has fallen to scholarly commentators<sup>138</sup> and the African Commission on Human and Peoples’ Rights (“African Commission”), established by the African Charter,<sup>139</sup> to determine. In his brief, but highly influential paper on this issue, Richard Kiwanuka argued that the term was deliberately left undefined as a calculated attempt by the drafters of the African Charter to avoid what they regarded as a difficult discussion over the precise meaning of that term.<sup>140</sup> In fact, Kiwanuka asserts that, in context, the African Charter contains no less than four different meanings of “peoples,” namely:

- (a) all persons within the geographical limits of an entity [that has] yet to achieve political independence or majority rule;
- (b) all groups of people with certain common characteristics who live within the geographical limits of an entity referred to in (a), or in an entity that has attained independence or majority rule;
- (c) the state and the people as synonymous; [and]

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138. See, e.g., Richard N. Kiwanuka, *The Meaning of “People” in the African Charter on Human and Peoples’ Rights*, 82 AM. J. INT’L L. 80, 82 (1988); see also Philip Kunig, *The Role of “Peoples’ Rights” in the African Charter*, in NEW PERSPECTIVES AND CONCEPTIONS OF INTERNATIONAL LAW: AN AFRO-EUROPEAN DIALOGUE 162 (Konrad G. Ginther & Wolfgang Benedek eds., 1983) (discussing the various possible definitions of “peoples” and noting that the definition is likely to be context-dependent in relation to the right in question). See generally Rachel Murray & Steven Wheatley, *Groups and the African Charter on Human and Peoples’ Rights*, 25 HUM. RTS. Q. 213, 215–16 (2003) (arguing that although the African Charter does not contain a “minorities article” similar to that of article 27 of the International Covenant on Civil and Political Rights, the Africa Commission has interpreted the notion of peoples’ rights to ensure, to a limited extent, a right of cultural security for minority groups, including through human rights to nondiscrimination, to take part in the cultural life of the community, to freedom of religion, and to freedom of expression).

139. Established under Part II (articles 30–63) of the African Charter and charged with three major functions: protection of human and peoples’ rights, promotion of human and peoples’ rights, and interpretation of the African Charter. In brief, it “verifies and supervises” the implementation of the African Charter. See generally EVELYN A. ANKUMAH, *THE AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS—PRACTICE AND PROCEDURES* 13 (1996); OUGUERGOUZ, *supra* note 135, at 203–11 (discussing the concept of peoples’ rights as articulated in the African Charter and what may be inferred from it).

140. Kiwanuka, *supra* note 138, at 82.

(d) all persons within a State.<sup>141</sup>

The precise meaning of “peoples” in the African Charter is especially relevant in the context of article 22. For the purpose of claiming and enjoying the right to development, discussed more below, does the term “peoples” include both individual citizens of a given state and “sub-state” groups, namely ethnic groups and national or regional minorities? Alternatively, does the right inure only to the entire population of the state collectively, as represented by the state’s government—in which case the “peoples” who are entitled to claim the right to development (and other similar rights) would in effect be the state? There is agreement on two points among most commentators who have joined this debate. First, that the term “peoples” as used in the African Charter primarily suggests the entire population of the state.<sup>142</sup> Second, that the term also can, and does, have different meanings in the context of different rights.<sup>143</sup> Thus, under certain circumstances the term could mean sub-state groups such as ethnic groups and national minorities, who are then entitled to claim the rights in question as a collective, and not as individual claimants. In fact, there are provisions in the African Charter where “people” may refer to more than one of Kiwanuka’s four meanings at the same time, as in the context of the rights to development, peace, and a satisfactory environment.<sup>144</sup>

The African Commission made a pertinent pronouncement in this vein in *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya* (the *Endorois* case).<sup>145</sup> This involved an application (or “communication,” in the language of the African Commission) in which an indigenous community in Kenya, the Endorois, alleged various violations by the government resulting from their displacement from their ancestral lands. The allegations related to violations of numerous articles under the African Charter, including the right to property, the right to free disposition of natural resources, the right to religion, the right to cultural life, and the right to development.<sup>146</sup> The African

141. *Id.* at 100–01.

142. *Id.* at 100.

143. See, e.g., Bülent Algan, *Rethinking “Third Generation” Human Rights*, 1 ANKARA L. REV. 121, 131 (2004); see also James Crawford, *Some Conclusions*, in THE RIGHTS OF PEOPLES 159, 170 (James Crawford ed., 1988).

144. See, e.g., Obiora C. Okafor, *A Regional Perspective: Article 22 of the African Charter on Human and Peoples’ Rights*, in OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, REALIZING THE RIGHT TO DEVELOPMENT: ESSAYS IN COMMEMORATION OF 25 YEARS OF THE UNITED NATIONS DECLARATION ON THE RIGHT TO DEVELOPMENT 373, 378–80 (2013); OUGUERGOUZ, *supra* note 135, at 320; Kiwanuka, *supra* note 138, at 84.

145. See *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, Communication 276/03, Afr. Comm’n H.P.R., ¶ 149 (Nov. 29, 2009), <http://caselaw.ihrrda.org/doc/276.03>.

146. *Id.*, ¶¶ 1, 21.

Commission noted that normatively, the African Charter is an innovative and unique human rights document compared to other regional human rights instruments, placing special emphasis on the rights of “peoples.”<sup>147</sup> Yet it noted that the African Charter is not only innovative in advancing this novel concept of peoples’ rights, but also in permitting a dynamic interpretation of the concept by not defining it.<sup>148</sup> The African Commission restated the difficulty identified by Kiwanuka in defining the term “peoples,” when it opined that

[the] relationships between indigenous peoples and dominant or mainstream groups in society vary from country to country. The same is true of the concept of “peoples.” The African Commission is thus aware of the political connotations that these concepts carry. Those controversies led the drafters of the African Charter to deliberately refrain from proposing any definitions for the notion of “peoples(s).”<sup>149</sup>

It is remarkable that, by its own admission, for more than two decades the African Commission avoided interpreting the concept of “peoples” in the African Charter, despite the peoples’ rights granted there by Member States, because it was not “at ease in developing rights where there was little concrete international jurisprudence.”<sup>150</sup> Lately, the African Commission has overcome its initial hesitation and caution. In a series of decisions, it has provided an interpretation clarifying its understanding of the normative content of peoples’ rights in the African Charter. These cases—among them the *Southern Cameroon*,<sup>151</sup> *Darfur*,<sup>152</sup> and *Endorois* cases—collectively concerned claims by self-described minority or indigenous peoples seeking the recognition and protection of various rights provided for under the African Charter. These included rights to self-determination; economic, cultural, or social development; and control over land and natural resources.

The African Commission offered a brief definition of peoples—employing Kiwanuka’s second interpretation—without any associated rem-

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147. *Id.*, ¶ 149.

148. *Id.*, ¶ 147.

149. *Id.*

150. African Commission on Human and Peoples’ Rights, *Report of the African Commission’s Working Group on Indigenous Populations/Communities*, at 50, DOC/OS/(XXXIV)/345 (2003), [https://www.achpr.org/public/Document/file/Any/expert\\_report\\_on\\_indigenous\\_communities.pdf](https://www.achpr.org/public/Document/file/Any/expert_report_on_indigenous_communities.pdf); see also RACHEL MURRAY, THE AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS AND INTERNATIONAL LAW 103–04 (2000).

151. Kevin Mgwanga Gunme et al. v. Cameroon, Communication 266/03, Afr. Comm’n H.P.R. (May 27, 2009), <http://caselaw.ihrda.org/doc/266.03>.

152. Sudan Human Rights Organization & Centre on Housing Rights and Evictions (COHRE) v. Sudan, Communication 279/03-296/05, Afr. Comm’n H.P.R. (May 27, 2009), <http://caselaw.ihrda.org/doc/279.03-296.05>.

edies in *Southern Cameroon*. It adopted a different approach in *Darfur* and *Endorois*. In *Southern Cameroon*, where the complainants alleged, among others, a violation of their right to self-determination, the African Commission stated that where a group manifests a common historical tradition, a racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinity, territorial connection, and a common economic life, it may be considered to be a “people.”<sup>153</sup> However, although it found that the Southern Cameroon community constituted a “people” within the independent state of Cameroon, the African Commission concluded that it was obliged to uphold the territorial integrity of the respondent state (Cameroon), and thus that it could not envisage, condone, or encourage secession as a form of self-determination for the Southern Cameroonians.<sup>154</sup>

In Darfur, the basic, undisputed facts were that, following the emergence of armed conflict in the Darfur region in western Sudan in 2003, the Sudanese government had engaged in discriminatory acts of violence against people of Black African origin in the Darfur region, namely the Fur, Marsalit, and Zaggawa tribes.<sup>155</sup> The complainants alleged that the respondent state had carried out a campaign to “forcibly evict thousands of black indigenous tribes, inhabitants of the Darfur region, from their homes, communities and villages.”<sup>156</sup> The complainants further alleged that the respondent had engaged in discriminatory forced evictions; destruction of public facilities and properties; looting and destruction of foodstuffs, crops, and live-livestock; poisoning of wells; and denial of access to water. Other alleged human rights violations included injuring and killing villagers, assaulting and raping women and girls, and destroying homes.<sup>157</sup> Despite the African Charter’s lack of a “minority article,” the African Commission accepted the argument that the tribes were a minority community and that they had been targeted as such, and it ordered the Sudanese authorities to cease the violations, pay reparations, and allow the community to return to their dispossessed lands and properties.<sup>158</sup>

Finally, in the *Endorois* case, the African Commission ultimately determined that the Endorois, having a clear historic attachment to a particular

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153. Kevin Mgwanga Gunme et al. v. Cameroon, Communication 266/03, ¶ 170.

154. *Id.* ¶¶ 190–91. Having found that Southern Cameroonians are “peoples,” the African Commission then continued to address whether they are entitled to the right of self-determination (¶ 182). Because the right to self-determination is explicitly provided by the African Charter, the African Commission instead should have asked whether, in this context, internal, as opposed to external, self-determination was justified. Its analysis did not separate internal from external self-determination (or “remedial secession”).

155. Sudan Human Rights Organization & Centre on Housing Rights and Evictions v. Sudan, Communication 279/03-296/05, ¶ 63.

156. *Id.*, ¶ 110.

157. *Id.*, ¶ 111.

158. *Id.*, ¶ 229.

land, are a distinct indigenous people.<sup>159</sup> This recognition was a significant development for the Endorois, and also a victory for other indigenous peoples across Africa whose existence has largely been ignored, both in law and in fact, by government arguments that all Africans are indigenous.<sup>160</sup> In all three of the cases, the African Commission found creative and fluid ways of interpreting the concept of peoples in the manner argued by Kiwanuka and other scholars.

Other writers have expressed a similar view. For example, Yusuf has observed that

the Commission, through its case law, has succeeded in applying the peoples' rights codified in the African Charter to concrete cases brought before it. As a result of the Commission's jurisprudence interpreting the rights of peoples, the recognition and protection of such rights may be accomplished with greater ease at the international level, thus contributing to the firm anchorage of peoples' rights in international law as well as in the public law of Africa.<sup>161</sup>

In sum, it is not an exaggeration to say that one of the fundamental differences between the African Charter and other international human rights instruments lies in its incorporation of peoples' rights alongside, and as a subset of, the more familiar category of human rights. To the extent that one aspect of the African Commission's interpretation of "people" relates to mi-

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159. Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya, Communication 276/03, ¶ 157.

160. *E.g.*, in the *Endorois* case, the Government of Kenya rejected the claim that the Endorois were a separate and distinct indigenous community. *Id.*, ¶ 157 ("The Respondent State disputes that the Endorois are indeed a community/sub-tribe or clan on their own, and it argues that it is incumbent upon the Complainants to prove that they are distinct from the other Tugen sub-tribe or indeed the larger Kalenjin tribe before they can proceed to make a case before the African Commission."). In Southern Africa (in particular Angola, Botswana, Namibia, South Africa, Zambia, and Zimbabwe), for example, with the notable exception of South Africa and, to a lesser extent Botswana and Namibia, claims by self-identifying indigenous peoples for indigenous rights are generally not recognized under the legal frameworks of the states. See Robert Hitchcock & Diana Vinding, *Indigenous Peoples' Rights of Southern Africa: An Introduction*, in *INDIGENOUS PEOPLES' RIGHTS OF SOUTHERN AFRICA* 8 (Robert Hitchcock & Diana Vinding eds., 2004) (noting that most governments have until now maintained that all their citizens are indigenous or, alternatively, argued that there is no such thing as an indigenous group in their country); see also Willem van Genugten, *Protection of Indigenous Peoples on the African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems*, 104 AM. J. INT'L L. 29 (2010) (discussing whether the Declaration on the Rights of Indigenous Peoples adopted by the United Nations General Assembly in 2007 might be instrumental in addressing gross human rights violations of African indigenous peoples, and analyzing the views of African governments expressed during the drafting and adoption of the Declaration, and as corrected and supplemented by the African Commission on Human and Peoples' Rights).

161. Yusuf, *supra* note 19, at 517.

nority groups and indigenous peoples, one can conclude that the African Charter's unique and extensive coverage of peoples' rights has contributed to the recognition and elucidation of those rights, specifically indigenous peoples' rights, at the international level. The *Endorois* case was the key decision in this respect: It represented the first time that an African indigenous people's collective rights over traditionally owned land were legally recognized by an international treaty body; the African Commission ordered the government to pay a full remedy to the concerned community for the loss suffered.<sup>162</sup> In addition, the decision was also the first globally to rule that the right to development is a human right.<sup>163</sup> The UN Committee on Economic, Social and Cultural Rights endorsed the African Commission's ruling in its April 2016 Concluding Observations, noting the failure of the Kenyan government to follow through with the implementation of the African Commission's ruling and recommending that the Kenyan government implement the decision without further delay.<sup>164</sup> The UN Committee on the Elimination of Racial Discrimination echoed the recommendation in May 2017.<sup>165</sup>

The African Commission is not a court, and its rulings or decisions are only advisory and not legally enforceable judgments. It is thus very significant that the most recent development in the interpretation of the normative content of peoples' rights comes from the African Court on Human and Peoples' Rights in its judgment in *African Commission on Human and Peoples' Rights v. Republic of Kenya* (the *Ogiek* case), delivered on May 26, 2017.<sup>166</sup> Like the *Endorois* case, this case involved a claim by a group of indigenous people in Kenya, the *Ogiek*. The *Ogiek* case was first lodged as a complaint before the African Commission. The African Commission, for the first time in its own history, referred the case to the African Court on the basis that it evinced serious human rights violations. After a protracted pro-

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162. See *supra* note 145.

163. Since, unlike the African Charter, other international or regional human rights treaties (such as the European Convention on Human Rights and the Inter-American Convention on Human Rights) have not incorporated the right to development, the issue has not been adjudicated in litigation or complaints submitted to the adjudicative bodies under these treaties (such as the European Court of Human Rights, the Inter-American Court, and the Inter-American Commission of Human Rights).

164. Economic and Social Council, Committee on Economic, Social and Cultural Rights, Concluding Observations on the Combined Second to Fifth Periodic Reports of Kenya, U.N. Doc. E/C.12/KEN/CO/2-5, ¶¶ 15–16 (Apr. 6, 2016).

165. Economic and Social Council, Committee on the Elimination of Racial Discrimination, Concluding Observations on the Fifth to Seventh Periodic Reports of Kenya, CERD/C/KEN/CO/5-7, ¶¶ 195–20 (May 12, 2017).

166. African Commission on Human and Peoples' Rights v. Kenya, No. 006/2012, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.]. (May 26, 2017), <http://www.african-court.org/en/index.php/55-finalised-cases-details/864-app-no-006-2012-african-commission-on-human-and-peoples-rights-v-republic-of-kenya-details>.

cess lasting eight years, the African Court found that the Kenyan government had violated seven articles of the African Charter—1, 2, 8, 14, 17(2) and (3), 21 and 22—in a land rights dispute that dated back to colonial times.<sup>167</sup> As noted above, articles 21 and 22 relate, respectively, to the rights of “all peoples” freely to dispose of their wealth and natural resources (the right to economic self-determination) and to develop economically, socially, and culturally (the right to development).<sup>168</sup> This was the first time that the African Court, which became operational in 2006,<sup>169</sup> ruled on an indigenous peoples’ case, and it was by far the most significant case brought to the court in its first eleven years of existence. Through this historic judgment, the African Court has validated the African Commission’s understanding of the peoples’ rights enshrined in the African Charter and reaffirmed the African contribution to the global jurisprudence on human rights generally and to indigenous peoples’ rights in particular.

The African Charter has not only given recognition to the rights of peoples, but it has also imported into the lexicon of conventional human rights law the notion of so-called “third generation” rights, such as the right to development, the right to national and international peace, and the right to a satisfactory environment.<sup>170</sup> When the African Charter incorporated these

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167. See Nyang’ori Ohenjo, *Micro Study: Kenya’s Catsaways: The Ogiek and National Development Processes* 1, MINORITY RIGHTS GROUP INTERNATIONAL (2003) (tracing the continuing history of the marginalization of the Ogiek back to the colonial-era Carter Land Commission (1932–38), which first recommended that the Ogiek be allocated land in a reserve despite their expressed wish to pursue development on their own terms).

168. See *infra* note 188 and accompanying text.

169. The African Court on Human and Peoples’ Rights was established by article 1 of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights, adopted by the OAU in Ouagadougou, Burkina Faso, on June 10, 1998. The Protocol came into force on January 25, 2004. The first judges of the Court were elected by the OAU Assembly of Heads of State and Government in January 2006 in Khartoum, Sudan, and the Court officially started its operations in Addis Ababa, Ethiopia, in November 2006. In August 2007, it moved to its permanent seat in Arusha, Tanzania. AFRICAN COURT ON HUMAN AND PEOPLES’ RIGHTS, African Court in Brief, <http://www.african-court.org/en/index.php/2-uncategorised/47-african-court-in-brief> (last visited Jan. 7, 2020).

170. The “three generations” theory of human rights categorizes human rights into three generations as follows: *first*, civil and political rights; *second*, economic, social and cultural rights; and *third*, collective or solidarity rights. This division of rights was first proposed in 1977 in a short essay by Karel Vasak, a Czech-born, French jurist and director of the Division of Human Rights and Peace of the United Nations Educational, Scientific, and Cultural Organization (“UNESCO”). See Karel Vasak, ‘A 30-Year Struggle’: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights, 30 UNESCO COURIER 29 (1977); see also Karel Vasak, *Pour une Troisième Génération des Droits de l’Homme*, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET 837, 840 (1984). Vasak’s metaphorical generations subsequently assumed great intellectual prominence and generated debates about both the relevance of the classification and the imperative of recognizing the indivisibility, interdepend-

rights in 1981, some of them were not yet recognized as “rights” under any extant, binding international human rights instrument or under customary international law.<sup>171</sup> At the time of their adoption, they were indeed “new human rights,” and, to that extent, the African Charter must be credited with setting the ball rolling towards their potential acceptance in international human rights law. In the section that follows, I focus specifically on just one of the new rights articulated in the African Charter: the right to development. This right is notable because it is now universally acknowledged by international human rights discourse and legal instruments, although opposition to the right remains in some circles.

## 2. The Right to Development

Historically, commentators credit Kéba M’baye, one of the principal drafters of the African Charter, with incorporating the right to development

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ence, and interrelatedness of human rights, a view that the UN has endorsed. See United Nations, Vienna Declaration and Programme of Action (1993), adopted by the World Conference on Human Rights in Vienna, part I, ¶ 5, U.N. Doc. A/CONF.157/23 (June 25, 1993); see also Philip Alston, *A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?*, 29 NETHERLANDS INT’L L. REV. 307 (1982); Antoine Bernard, *One and Indivisible*, 47 UNESCO COURIER 15 (1994); Peter Cumper, *Human Rights: History, Development and Classification*, in HUMAN RIGHTS: AN AGENDA FOR THE 21ST CENTURY 1 (Angela Hegarty & Siobhan Leonard eds., 1999); Jack Donnelly, *Third Generation Rights*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW 119 (Catherine Brölmann et al. eds., 1993); Eric Engle, *Universal Human Rights: A Generational History*, 12 ANN. SURVEY INT’L & COMP. L. 219 (2006); Michael Freeman, *Are There Collective Human Rights?*, 43 POL. STUD. 25 (1995); John Mubangizi, *Towards a New Approach to the Classification of Human Rights with Specific Reference to the African Context*, 4 AFR. HUM. RTS. L.J. 93 (2004); Ida Koch, *Economic, Social and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Approach*, 10 INT’L J. HUM. RTS. 405 (2006); James W. Nickel, *Rethinking Indivisibility: Towards a Theory of Supporting Relations Between Human Rights*, 30 HUM. RTS. Q. 984 (2008); DANIEL J. WHELAN, *INDIVISIBLE HUMAN RIGHTS: A HISTORY* 210 (2011); Patrick Macklem, *Human Rights in International Law: Three Generations or One?*, 3 LONDON REV. INT’L L. 61 (2015).

171. Then-unrecognized rights include the right to development, the right to peace, the right to a satisfactory environment, and the right of ownership of the common heritage of humankind. This is not to suggest that discussion or conceptualization of some of these rights only started with the adoption of the African Charter in 1981. As mentioned above, Karel Vasak is credited with the original conceptualization of a third generation of rights—collective rights or rights of solidarity—in his short but influential essay in 1977. Moreover, as early as 1976, the UN Commission on Human Rights had adopted a resolution containing the first formal recognition of peace as a human right. See U.N. Comm’n on Human Rights Res. (XXXII), at 5 (Feb. 27, 1976). Two years later, the UN General Assembly recognized the right to peace as both an individual and a collective right in its resolution, G.A. Res. 33/73 (Dec. 15, 1978). Some scholars had also advocated for the recognition of a right to peace as a human right. See, e.g., Philip Alston, *Peace as a Human Right*, 11 BULLETIN OF PEACE PROPOSALS 319, 329 (1980). However, it was only with the adoption of the African Charter that these rights were for the first time included in an international or regional human rights instrument.

in that treaty.<sup>172</sup> A Senegalese human rights lawyer, scholar, one-time member of the UN Human Rights Commission, and later judge of the International Court of Justice, he was an influential figure in the early debates about the need for the adoption of a continent-wide human rights instrument in Africa. M'baye initiated the discourse on the concept of "development" as a human right in a 1972 lecture he delivered at the International Institute of Human Rights in Strasbourg.<sup>173</sup> At the time, developing countries that supported the notion of a right to development did so primarily in the context of debates about economic development and the permanent sovereignty of states over natural resources, as part of the push for a New International Economic Order ("NIEO"), which subsequently stalled. Commenting on M'baye's groundbreaking role, Sandesh Sivakumaran has observed

M'baye distinguished between "le droit du développement" and "le droit au développement" and argued for a right to development. A few years later, the Commission on Human Rights, under the Chairmanship of M'baye, adopted a resolution which recommended that ECOSOC invite the Secretary-General to undertake a study on the matter. A study was prepared, which was considered by the Commission, and a resolution adopted, which "reiterate[d] that the right to development is a human right". The General Assembly later declared that "the right to development is a human right", and some years later, the Declaration on the Right to Development was adopted by 146 votes to 1 with 8 abstentions.<sup>174</sup>

Even those writers who dispute the origin of the right to development still locate the genesis of the discourse around it in Africa. They claim that the expression "right to development" was probably first uttered by Doudou Thiam, minister of foreign affairs of Senegal, at a conference of the Group

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172. ISABELLA BUNN, *THE RIGHT TO DEVELOPMENT AND INTERNATIONAL ECONOMIC LAW* 40–44 (2012); see also Jack Donnelly, *In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development*, 15 CAL. W. INT'L L. J. 473 (1985).

173. See Kéba M'baye, *Le Droit au Développement Comme un Droit de l'Homme [Inaugural Address to the Third Teaching Session of the International Institute of Human Rights]*, 5 RÉVUE DES DROITS DE L'HOMME 503 (1972).

174. Sandesh Sivakumaran, *The Influence of Teachings of Publicists on the Development of International Law*, 66 INT'L & COMP. L.Q. 1, 8–9 (2017) (internal citations omitted); see UN General Assembly, Declaration on the Right to Development, *supra* note 185. The Commission on Human Rights referred to the right to development in several resolutions before the General Assembly adopted the Declaration. See, e.g., Comm'n on Human Rights, 49th Sess., U.N. Doc. E/CN.4/1993/35(XXXV) (Jan. 21, 1993); Comm'n on Human Rights, 41st Sess., U.N. Doc. E/CN.4/1985/43 (Feb. 4, 1985); Comm'n on Human Rights, 37th Sess., U.N. Doc. E/CN.4/RES/36(XXXVII) (Mar. 11, 1981); Comm'n on Human Rights, 37th Sess., Supp. No. 5, U.N. Doc. E/CN.4/1475 (1981); Comm'n on Human Rights, 33d Sess., U.N. Doc. E/CN.4/RES/4(XXXIII) (Feb. 21, 1977); Comm'n on Human Rights, 32d Sess., Supp. No. 6, U.N. Doc. E/CN.4/1257 (1977).

of 77 in Algiers, Algeria, in October 1967. In a rarely quoted statement in the historical literature on the subject,<sup>175</sup> he declared: “[Just] as, in the developed nations, the right to education, health, [and] employment has been proclaimed for individuals, we must here proclaim, loud and clear, the right to development for the nations of the Third World.”<sup>176</sup> Furthermore, it has been noted that fifteen months after the Group of 77 conference, and again in the same city, the Archbishop of Algiers similarly declared that “the right to development should be proclaimed by the Third World.”<sup>177</sup>

In contrast, the UDHR, adopted in 1948, did not expressly stipulate the right to development as a separate right.<sup>178</sup> At most, one may infer this right from article 22 of the UDHR, which provides that

[e]veryone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each States, of the economic, social and cultural rights indispensable for his dignity and free development of his personality.<sup>179</sup>

Neither the International Covenant on Civil and Political Rights (the “ICCPR”),<sup>180</sup> nor the International Covenant on Economic, Social and Cultural Rights (the “ICESCR”),<sup>181</sup> both adopted in 1966, provided this right. Common article 1 to both the ICCPR and ICESCR mentions “development,” but not as a right with corresponding obligations on states. Rather, the provision in the two Covenants links development to the right to self-determination, stipulating it as an aspirational goal.<sup>182</sup> In the same vein, neither of the two regional human rights treaties that preceded the African Charter—the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)<sup>183</sup> in 1950

175. See OUGUERGOUZ, *supra* note 135, at 298.

176. Doudou Thiam, *L’Afrique Demande un Droit International d’un Nouveau*, 1 VERFASSUNG UND RECHT IN ÜBERSEE 52, 54 (1968).

177. OUGUERGOUZ, *supra* note 135, at 298 n.1012.

178. G.A. Res. 217 (III)A, Universal Declaration of Human Rights (Dec. 10, 1948).

179. UDHR art. 22.

180. International Covenant on Civil and Political Rights, *supra* note 76.

181. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

182. Article 1(1) of both the ICESCR and the ICCPR provides that “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

183. European Convention on Human Rights, *supra* note 102.

and the American Convention on Human Rights (or the Pact of San José) in 1969<sup>184</sup>—included the right to development.

However, a number of important and more recent soft law instruments have articulated the right to development. The most notable of these are the 1986 Declaration on the Right to Development,<sup>185</sup> the 1992 Rio Declaration on Development and Environment,<sup>186</sup> the 1993 Vienna Declaration and Programme of Action,<sup>187</sup> and the 2007 UN Declaration on Rights of Indigenous Peoples.<sup>188</sup> Currently, no universal, legally binding treaty directly provides for the right to development.

Consequently, the African Charter stands out as the first and only regional human rights instrument expressly providing for the right to development. Article 22 provides as follows:

- (1) All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and dignity and in the equal enjoyment of the common heritage.
- (2) States shall have the duty, individually and collectively, to ensure the exercise of the right to development.<sup>189</sup>

Olajumoke Oduwole has suggested that the drafters of article 22 of the African Charter attempted to achieve a comprehensive right with attendant obligations by drawing from provisions of article 22 of the UDHR and article 1(1) of the ICESCR.<sup>190</sup>

This article is a broad-brush survey of Africa's contributions to the development of international law and does not intend to offer a detailed examination of the right to development—its content, meaning, and scope—or a review of the copious academic literature and debates on the subject.<sup>191</sup>

184. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

185. UN General Assembly, Declaration on the Right to Development, ¶ 2, U.N. Doc. A/RES/41/128 (Dec. 4, 1986). Notably, the African Charter came into effect the same year, on October 21. See African Union, *African Charter on Human and Peoples' Rights*, <https://au.int/en/treaties/african-charter-human-and-peoples-rights> (last visited Jan. 7, 2020).

186. Rep. of the UN Conference on Environment and Development, U.N. Doc. A/CONF.151/26 (Vol. I) (June 14, 1992).

187. World Conference on Human Rights, Vienna Declaration and Programme of Action, ¶ 10, U.N. Doc. A/CONF.157/23 (June 25, 1993).

188. UN General Assembly, Declaration on the Rights of Indigenous Peoples, U.N. Doc. A/RES/61/295 (Oct. 2, 2007).

189. African Charter, *supra* note 17, art. 22.

190. Oduwole, *supra* note 191, at 581.

191. There is a fair amount of literature on the right to development, including discussions specifically focusing on the African contribution to the concept. A wide-ranging collection of essays on various aspects of the right to development is presented in OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, *REALIZING THE RIGHT TO DEVELOPMENT: ESSAYS IN COMMEMORATION OF 25 YEARS OF THE UNITED NATIONS DECLARATION ON THE*

However, it is worth noting that the notion of the right to development has undergone significant changes in its meaning and scope since the adoption of the Declaration on the Right to Development by the UN General Assembly in 1986<sup>192</sup> and the African Charter. For one thing, when the debate about the right to development first emerged in the 1970s, development was synonymous with economic growth; today, the concept of development has expanded to embrace human development and sustainability broadly.<sup>193</sup> However, with the expansion of the concept of development, so too have the meaning and scope of the right to development been broadened, perhaps at the expense of clarity and certainty.

Commentators have asserted the status of the right to development as a human right in various descriptions. These include claims that the right is “a composite right of all universal human rights,”<sup>194</sup> and “the alpha and omega of human rights.”<sup>195</sup> Others have even argued, wrongly in my view, that the right to development has attained the status of customary international law.<sup>196</sup> Still other commentators stridently insist that the right to development has no claim to any status as a human right and advocate for its abolition.<sup>197</sup> Despite these divergent scholarly views, and the absence of a global

RIGHT TO DEVELOPMENT (2013). See generally Arjun Sengupta, *Conceptualizing the Right to Development for the Twenty-First Century*, in *id.* at 67, 67–87; Okafor, *supra* note 144, at 373–84 (discussing article 22 of the African Charter); Olajumoke O. Oduwole, *Africa's Contribution to the Advancement of the Right to Development in International Law*, in *SHIELDING HUMANITY: ESSAYS IN INTERNATIONAL LAW IN HONOUR OF JUDGE ABDUL G. KOROMA*, *supra* note 8, at 565 (examining the “universal right to development” and the “peoples’ right to development in Africa” in the context of the history of African development, and comparing the challenges facing both concepts with respect to their scope and enforceability).

192. See UN General Assembly, Declaration on the Right to Development, *supra* note 185.

193. See Benjamin Knutsson, *The Intellectual History of Development: Towards a Widening Potential Repertoire*, 13 *SCHOOL OF GLOBAL STUD.: PERSP* 1, 25–33 (Apr., 2009), [https://www.gu.se/digitalAssets/1272/1272997\\_Perspectives\\_13.pdf](https://www.gu.se/digitalAssets/1272/1272997_Perspectives_13.pdf); see also AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 36–44 (1999).

194. See generally Arjun Sengupta, *Fifth Report of the Independent Expert on the Right to Development*, COMMISSION ON HUMAN RIGHTS, U.N. Doc. E/CN.4/2002/WG.18/6 (Sept. 18, 2002); Arjun Sengupta, *On the Theory and Practice of the Right to Development*, 24 *HUM. RTS. Q.* 837, 870 n.86 (2002) (characterizing the right to development as the right to a process of development).

195. Mohammed Bedjaoui, *The Right to Development*, in *INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS* 1177, 1182 (Mohammed Bedjaoui ed., 1991).

196. See Nienke van der Have, *The Right to Development: Can States Be Held Responsible?*, in *DEVELOPMENT AND EQUITY: AN INTERDISCIPLINARY EXPLORATION BY TEN SCHOLARS FROM AFRICA, ASIA AND LATIN AMERICA* 191 (Dick Foeken et al. eds., 2014).

197. See, e.g., Arne Vandenberg, *The Right to Development in International Human Rights Law: A Call for Its Dissolution*, 31 *NETHERLANDS Q. HUM. RTS.* 187 (2013); see also Stephen Marks, *The Human Right to Development: Between Rhetoric and Reality*, 17 *HARV. HUM. RTS. J.* 138 (2004); Isabella Bunn, *The Right to Development: Implications for International Economic Law*, 15 *AM. U. INT'L L. REV.* 1425 (2000).

treaty on the matter, the institutional recognition of the right to development by the UN is no longer in doubt: The right is manifested in the advocacy work and promotional agenda of the Office of the UN High Commissioner for Human Rights.<sup>198</sup> Moreover, in his 1994 *Agenda for Development*, the UN Secretary-General asserted that development is a fundamental human right.<sup>199</sup> But, of course, that has not settled all controversy regarding the nature and content of the right to development.

Within the African human rights system, article 22 of the African Charter has provided an opportunity for the African Commission and other regional bodies to distill and interpret the meaning and practical efficacy of the right. Admittedly, the jurisprudence of the African Commission on this issue has to date been very limited. Out of over 220 Communications submitted to the African Commission since its inception in 1987, only seven have invoked article 22 of the African Charter; one of these (in fact, the very first one) was withdrawn before it could be considered, and two others were ruled inadmissible.<sup>200</sup> However, in a series of cases, including the *Endorois* case referred to earlier in connection with the concept of peoples' rights, the African Commission has considered the nature of the right to development and its implications for the internal obligations of states towards its own citizens.<sup>201</sup>

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198. In a follow-up to the Vienna Declaration and Programme of Action of 1993, the United Nations General Assembly established the post of High Commissioner for Human Rights, also in 1993, by Resolution A/Res/48/141 (20 December 1993). Among the responsibilities that the General Assembly assigned to the High Commissioner under this resolution is to "promote and protect the realization of the right to development and to enhance support for relevant bodies of the United Nations system for this purpose." *Id.* ¶ 4(c). The Office of the High Commissioner for Human Rights has since pursued this goal, including by initiating and supporting attempts to clarify and advocate the right to development, and servicing several bodies that have been created for this process, such as various Intergovernmental Working Groups on the Right to Development (since 1993), a UN Independent Expert on the Right to Development (1999–2004), and a High-Level Task Force on the Implementation of the Right to Development (2004–2010).

199. U.N. Secretary-General, *Report of the Secretary General: An Agenda for Development*, ¶ 3, U.N. Doc. A/48/935 (May 6, 1994).

200. See generally Serges A. Kamga & Charles M. Fombad, *A Critical Review of the Jurisprudence of the African Commission on the Right to Development*, 57 J. AFR. LAW 196 (2013).

201. Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya, Communication 276/03, Afr. Comm'n H.P.R., ¶ 211 (Nov. 29, 2009), <http://caselaw.ihlda.org/doc/276.03>. In the recent *Ogiek* case, the first and so far only case brought to the African Court by the African Commission, the Court, *inter alia*, examined an alleged violation of the right to development by the Kenyan government and concluded that there was a violation. See African Commission on Human and Peoples' Rights v. Kenya, No. 006/2012, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], (May 26, 2017), <http://www.african-court.org/en/index.php/55-finalised-cases-details/864-app-no-006-2012-african-commission-on-human-and-peoples-rights-v-republic-of-kenya-details>.

The African Commission's most extensive conclusions on the right to development were expressed in the *Endorois* case. These conclusions included the following: First, the African Commission expressed the view that "the right to development is a two-pronged test, that it is both *constitutive* and *instrumental*, or useful as both a means and an end."<sup>202</sup> The African Commission went on to say that a violation of either the procedural or substantive element constitutes a violation of the right to development, and agreed with the view of the UN Independent Expert on the Right to Development that "development is not simply the state providing, for example, housing for particular individuals or peoples; development is instead about providing people with the ability to choose where to live."<sup>203</sup> The African Commission also expressed the view that freedom of choice must be present as part of the right to development.<sup>204</sup>

The African Commission drew upon the UN Declaration on the Right to Development<sup>205</sup> and the jurisprudence of the Inter-American Court on Human Rights<sup>206</sup> to conclude that "[the] result of development should be empowerment of the Endorois community. It is not sufficient for the Kenyan authorities merely to give food aid to the Endorois. The capabilities and choices of the Endorois must improve in order for the right to development to be realized."<sup>207</sup> Thus, the African Commission drew a link between the right to development and the issue of participation, and said that the state has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions.<sup>208</sup> Inadequate consultations leave a community "feeling disenfranchised from a process of utmost importance to their life as a people."<sup>209</sup> This conclusion is particularly relevant for situations in which the dispossession of an indigenous community of its ancestral lands and rights to property is bound to have a negative impact on its ability to choose its own path of development.

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202. Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya, Communication 276/03, ¶ 277. (Emphasis in the original).

203. *Id.*, ¶ 278.

204. *Id.*

205. UN General Assembly, Declaration on the Right to Development, art. 2(3), U.N. Doc. A/RES/41/128 (Dec. 4, 1986).

206. *Yakye Axa Indigenous Community v. Paraguay*, Judgment, Inter-Am. Ct. H.R. (ser. C), No. 125 (June 17, 2005); *Sawhoyamaya Indigenous Community v. Paraguay*, Judgment, Inter-Am. Ct. H. R. (ser. C), No. 147 (Mar. 29, 2006); and *Saramaka People v. Suriname*, Judgment, Inter-Am. Ct. H.R. (ser. C), No. 172 (Nov. 28, 2007).

207. Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya, Communication 276/03, ¶ 283.

208. *Id.*, ¶ 291.

209. *Id.*, ¶ 297.

On the whole, the limited jurisprudence on the right to development has not had much impact within the African human rights system, and still less in the universal human rights sphere. However, the precedents set by this limited jurisprudence could contribute positively to the continuing global debate on the conceptualization, legalization, and justiciability of the right to development. In particular, the African Commission's decisions in the *Ogoni* case, the *Endorois* case, and the *Darfur* Case, and the African Court's judgment in the *Ogiek* case provide the international movement, within the UN and other international agencies, with valuable experience to consolidate a global right to development and implement the UN's 2015 Sustainable Development Goals ("SDGs").<sup>210</sup>

The international legal community can draw two principal lessons from these cases. The first lesson, as Obiora Okafor has observed, is "that *people* [(civil society groups and local authorities)] must be central to a new global partnership" a fact which "translates to a lived appreciation of this important lesson from African theory and practice on the right to development" by the international community.<sup>211</sup> That is, the global conceptualization of the right to development needs to recognize that this right belongs to "peoples," in the various senses described above and as endorsed by the African Commission in the *Endorois* case and the African Court in the *Ogiek* case. And because people are the right-holders of the right to development, they must be central to any development process purportedly executed on their behalf. The imperative of consulting with the peoples—or communities—at the heart of the development process was emphasized not only in *Endorois* and *Ogiek* but also earlier, in the African Commission's famous *Ogoni* case.<sup>212</sup>

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210. See G.A. Res. 70/1, ¶ 10 (Sep. 25, 2015).

211. Obiora C. Okafor, *African Lessons for Post-2015 Global Right to Development Conceptualization and Practice*, 2 TRANSNAT'L HUM. RTS. REV. 168, 170 (2015) (citing HIGH LEVEL PANEL ON THE POST-2020 DEVELOPMENT AGENDA, *A New Global Partnership: Eradicate Poverty and Transform Economies through Sustainable Development* (May 30, 2013), <http://www.post2015hlp.org/the-report>).

212. Social and Economic Rights Action Center [SERAC] and Center for Economic and Social Rights [CESR] v. Nigeria, Communication 155/96, Afr. Comm'n H.P.R., ¶ 6 (May 27, 2002). The *Ogoni* case was concerned with a number of issues, including peoples' rights to health (article 16), economic self-determination (article 21), and satisfactory environment favorable to their development (article 24), as well as implied rights to food and housing/shelter. An important aspect of the case was the African Commission's conclusion that governments have a duty to protect their citizens from damaging acts perpetrated by private parties, and that this duty calls for positive action on the part of governments. In this case, there were violations of a range of human rights resulting from oil-extraction and exploitation activities by an oil consortium, which produced immense damage to the lands and livelihoods of the Ogoni people, affecting their development, environment, and security. Overall, the decision of the African Commission was a positive and welcome contribution to a stronger protection of economic, social, cultural, and collective rights in the African context. In addition, the case also showed the potential of a class-action complaint presented for and on behalf of groups recog-

Secondly, in their respective analyses of the realization of the right to development, both the African Commission and the African Court endorsed the principle of “adequate compensation.”<sup>213</sup> This principle postulates that sub-state groups—whether ethnic, national, or regional minorities—constitute “peoples” in certain situations. These peoples must be compensated for any taking of their property or resources that denies them the opportunity to exploit those resources and, thereby, to enjoy or realize their right to development.<sup>214</sup> If adopted at the international level, this principle could be beneficial to the conceptualization of a universally recognized right to development and the identification of the holders or subjects of such a right.<sup>215</sup>

#### D. *The Constitutive Act of the African Union (2000): Codifying the Right of Humanitarian Intervention*

Potentially the most consequential normative contribution to international law by African states in recent times finds its basis in article 4 of the AU Constitutive Act. Article 4(h) provides for “[the] right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.”<sup>216</sup>

Article 4(h) is a substantial legal innovation: It has crystallized into treaty form a diffuse set of legal ideas and concepts that are similar to, and

nized as constituting a “minority,” “community,” or “people.” The action paved the way for the *Endorois* and *Ogiek* cases.

213. In the *Ogiek* case, the African Court recalled article 27(1) of the Protocol on the Establishment of the African Court from which it derives its power to award compensation: “[If] the Court finds that there has been violation of human and peoples’ rights, it shall make appropriate orders to remedy the violation including the payment of fair compensation or reparation.” *Centre for Minority Rights Development v. Kenya*, Communication 276/03, ¶ 222. In the *Endorois* case, after finding that the Endorois community had suffered a violation of article 22 of the African Charter (the right to development), the African Commission, among other recommendations, called upon the Kenya to: “[Pay] adequate compensation to the [Endorois] community for the loss suffered.” *Centre for Minority Rights Development v. Kenya*, Communication 276/03, ¶ 298 & recommendation 1c.

214. See *African Commission on Human and Peoples’ Rights v. Kenya*, No. 006/2012, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.]. (May 26, 2017), <http://www.african-court.org/en/index.php/55-finalised-cases-details/864-app-no-006-2012-african-commission-on-human-and-peoples-rights-v-republic-of-kenya-details>, ¶¶ 198–201.

215. In 1978 and subsequent to his 1972 lecture, Kéba M’baye himself posited that the subjects of the right to development are “at once individuals, peoples and States,” and the right is “a prerogative that peoples may demand of their States or of the international community.” See OUGUERGOUZ, *supra* note 135, at 299–300. While not universally supported, this view has gained currency over the last four decades. See generally Arjun Sengupta, *Realizing the Right to Development*, 31 DEV. & CHANGE 553 (2000).

216. AU Constitutive Act, *supra* note 10.

form the basis for, the principle of the responsibility to protect (“R2P”). R2P was developed as an alternative to humanitarian intervention, allowing unilateral force by a state or a group of states to protect human rights in another state, where prevention and peaceful means fail, under authorization of the UN Security Council under existing rules of international law. While humanitarian intervention assumes a “right to intervene,” R2P is predicated on a “responsibility to protect.” Article 4(h) of the AU Constitutive Act embraces aspects of both R2P and a right to intervene, while raising significant questions about the relationship between the AU’s Peace and Security Council (“PSC”) and the United Nations Security Council (“UNSC”) and about ongoing practice and implementation of both norms. This section begins by describing how the two norms—humanitarian intervention and responsibility to protect—arose before describing their interplay in article 4(h) of the AU Constitutive Act.

### 1. Background on Humanitarian Intervention and the Responsibility to Protect

The right of humanitarian intervention is not a solely African invention. Some have argued that the right of humanitarian intervention “can be found in treaty law[—]including the Convention on the Prevention and Suppression of the Crime of Genocide, international customary law[,] and the UN Charter[—]although provisions are also found in other instruments including the Charter [*sic*] of the AU.”<sup>217</sup> It is possible that both the right of humanitarian intervention and R2P have their origins in an even more distant precedent—the Martens Clause contained in the Hague Conventions of 1899 (II) and 1907 (IV).<sup>218</sup> But, despite the fact that the idea has long been espoused in international law, the adoption of the AU Constitutive Act was the first occasion when a regional organization incorporated the right of humanitarian intervention in its foundational legal instrument.<sup>219</sup>

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217. See Int’l Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, ¶¶ 1.25–1.26 (December 2001).

218. See Jeremy Sarkin, *The Role of the United Nations, the African Union and Africa’s Sub-Regional Organizations in Dealing with Africa’s Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect*, 53 J. AFR. L. 1, 9–10 (2009) (tracing the origins of the responsibility to protect to the Martens Clause which codified the legal principles of “laws of humanity, and the requirements of the public conscience”).

219. See Christian Wyse, *The African Union’s Right of Humanitarian Intervention as Collective Self-Defense*, 19 CHI. J. INT. L. 295, 310 (2018) (noting that article 4(h) shows the commitment of African Leaders to move past the shadow of the OAU and the Rwandan genocide, and that the provision is unique among regional organizations); see also Ntombizozuko Dyani-Mhango, *Reflections on the African Union’s Right to Intervene*, 38 BROOK. J. INT’L L. 1, 12 (2012) (arguing that the AU is the first regional organization to codify a limited right of humanitarian intervention).

Though incorporated into the AU Constitutive Act, the nature of the right to humanitarian intervention is not yet settled. One scholar has recently noted that in modern times “[a right] of humanitarian intervention refers to an independent legal basis, absent State consent, United Nations Security Council (UNSC) authorization[,] or justifications of self-defense, for a State to use unilateral military force to protect individuals from egregious breaches of human rights occurring in a third State.”<sup>220</sup> In an earlier study, another scholar described humanitarian intervention as

[the] protection by a state or group of states of fundamental human rights, in particular the right to life, of nationals of, and [persons] residing in, the territory of other states, involving the use of force, such protection taking place neither upon authorization by the relevant organs of the UN nor upon invitation by the legitimate government of the target state.<sup>221</sup>

Moreover, the status of the right as *lex lata* and as a binding norm of international law was, and continues to be, contested.<sup>222</sup> I will not rehearse the debates in any detail here.<sup>223</sup> In short, although it appeared that the principle had crystallized over the last two decades, recent arguments over the relevance of humanitarian intervention in the long-running Syrian conflict have revived the lingering divergence of opinion between policy-makers and scholars.<sup>224</sup>

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220. Chris O’Meara, *Should International Law Recognize a Right of Humanitarian Intervention?*, 66 INT’L & COMP. L.Q. 441 (2017).

221. Dino Kritsiotis, *Reappraising Policy Objections to Humanitarian Intervention*, 19 MICH. J. INT’L L. 1005, 1021 (1998).

222. The question of whether a right of humanitarian intervention exists in international law, or should exist, is a long-standing and much-debated issue. *See e.g.*, O’Meara, *supra* note 220; Kritsiotis, *supra* note 221; *see also*, Christopher Greenwood, *Is There a Right of Humanitarian Intervention?*, 49 THE WORLD TODAY 34 (1993); Ian Hurd, *Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World*, 25 ETHICS AND INT’L AFF. 293 (2011). *See generally* THOMAS G. WEISS, HUMANITARIAN INTERVENTION (2007). Most writers reject the argument that international law currently recognizes or should recognize a right of humanitarian intervention. *See generally* Daniel Wolf, *Humanitarian Intervention*, 9 MICH. J. INT’L L. 333, 363–66 (1988) (noting that the fear of abusive invocation of humanitarian intervention at the heart of virtually every argument that rejects the doctrine is unpersuasive, and instead arguing that recognition of the legality, as well as the morality, of the right of humanitarian intervention is essential to the preservation and advancement of the world legal order); Barry M. Benjamin, *Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities*, 16 FORDHAM INT’L L.J. 120 (1992) (arguing that the legalization of limited unilateral humanitarian intervention would effectively balance human rights and legitimate state sovereignty, while maintaining international security).

223. *See generally* O’Meara, *supra* note 220 (citing some of the more recent scholarly works on the subject).

224. Nigel S. Rodley, *Humanitarian Intervention*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 775, 787 (Marc Weller ed., 2015).

To put it simply, supporters of this right argue that it is necessary to dispense with the old-fashioned theory of state sovereignty, which is sometimes used to shield states from criticism when they perpetrate or permit the massacre of their people.<sup>225</sup> It is true that the veil of state sovereignty provided an easy excuse for murderous dictatorial regimes in Africa—notably those of Jean-Bedel Bokassa in the Central African Republic,<sup>226</sup> Macias Nguema in Equatorial Guinea,<sup>227</sup> and Idi Amin in Uganda in the 1970s and 1980s<sup>228</sup>—to rebuff any external criticism and potential intervention during

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225. Harold Koh, a U.S. diplomat and scholar, supports the right of humanitarian intervention and was looking to intervention in Syria as an opportunity to crystallize a new norm of customary international law. See Harold Koh, *Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward)*, EJIL: TALK! (Oct. 4, 2013), <http://www.ejiltalk.org/syria-and-the-law-of-humanitarian-intervention-part-ii-international-law-and-the-way-forward>; see also Anders Henriksen & Marc Schack, *The Crisis in Syria and Humanitarian Intervention*, 1 J. USE OF FORCE & INT'L L. 122 (2014) (discussing the chemical weapons attack on Gouta near Damascus, Syria, on August 21, 2013, which killed an estimated 1,400 people; the threats by a number of UN Member States—including the United States, United Kingdom, France, and Denmark—to launch a military operation against the alleged perpetrators; Russian resistance to these threats, and the ensuing debate about the legality of and justification for humanitarian intervention in Syria).

226. Jean-Bédél Bokassa was a political and military leader who served as president of the Central African Republic for a decade from January 1966 to December 1976 following a coup d'état. He proclaimed the country the "Central African Empire" and declared himself Emperor Bokassa I on December 4, 1976. His reign was marked by repression and massive abuses of human rights that resulted in the death and imprisonment of political opponents and the deaths of around 100 school children who were protesting against paying for and wearing compulsory uniforms with Bokassa's image on them. He was overthrown by forces loyal to former president David Dacko, with the assistance of 300 French troops, on September 21, 1979. See BRIAN TITLEY, DARK AGE: THE POLITICAL ODYSSEY OF EMPEROR BOKASSA 125–51 (1997) (discussing the repressive turn of his reign and France's role in his ouster).

227. Macias Nguema was the first post-independence leader of Equatorial Guinea, in power from October 1968 to August 1979. Although he took office as a democratically elected president, he quickly turned authoritarian and, on July 29, 1973, turned the country into a single party state under a new constitution that granted him absolute power. He presided over a reign of terror that saw massive abuses of human rights, with extra-judicial executions of political opponents and the country's educated class, the majority of whom were driven into exile—if not killed. It is reported that by the time he was overthrown in a military coup by his own nephew on Aug. 3, 1979, he had killed two-thirds of the members of the legislature and ten of his original ministers. See Simon Baynham, *Equatorial Guinea: The Terror and the Coup*, 36 WORLD TODAY 65 (1980) (chronicling the reign of terror under the regime of Macias Nguema and the developments that led to his overthrow).

228. Idi Amin ruled Uganda after coming to power in a military coup on January 25, 1971. He was driven from office by exiled Ugandan rebels who were assisted by Tanzanian troops (who had invaded Uganda to repel Amin's troops, who had earlier invaded Tanzania and attempted to annex its Kagera region). Amin fled the country on April 11, 1979. Although his rule only lasted eight years, by the end of it he had attained a reputation for committing the most rampant human rights abuses of any African leader until then. Human rights groups and international observers have estimated that up to half a million people were killed under his regime. Yet the OAU remained silent throughout this period and refrained from criticizing

the era of the OAU. Despite the glare of global publicity, these massacres went unchallenged by other African countries because the OAU Charter, like the UN Charter, included the principle of non-interference in the domestic affairs of its Member States.<sup>229</sup> The inglorious history of massacres, gross violations of human rights, and forced migrations and population movements resulting from civil conflicts within Africa that the OAU consistently failed to condemn, along with the more recent Rwanda genocide,<sup>230</sup> provided the backdrop for the incorporation of the right of intervention in the AU Constitutive Act. As argued elsewhere,

[in] an era in which post-independent Africa had witnessed the horrors of genocide and ethnic cleansing on its own soil and against its own kind, it would have been absolutely remiss for the Constitutive Act to remain silent on the question of the right to intervene in respect of grave circumstances such as genocide, war crimes and crimes against humanity.<sup>231</sup>

Today, there is wide recognition that the expansion of international human rights law, as well as international humanitarian law and international criminal law, have chipped away at the concept of state sovereignty.<sup>232</sup> This has diminished the core claim that the state is free to do as it wishes within its own territory, including violating the internationally recognized human

him or intervening, just as they had remained silent with respect to Bokassa's and Nguema's atrocities. In fact, the OAU rewarded Idi Amin by permitting him to host the twelfth ordinary session of the Assembly of Heads of State and Government in Kampala in 1975. *See generally* Peter F.B. Nayenga, *Myths and Realities of Idi Amin Dada's Uganda*, 22 AFR. STUD. REV. 127 (1979).

229. *See* OAU Charter art. III(2), May 25, 1963; U.N. Charter art. 2(7).

230. It is significant that the AU Constitutive Act was adopted during the same OAU summit when an international commission appointed by the OAU to investigate the circumstances leading to and surrounding the Rwanda genocide presented in its report. *See* African Union, *Rwanda: The Preventable Genocide—The Report of the International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events*, ch. 20.70 (2000).

231. *See* Tiyanjana Maluwa, *Reimagining African Unity: Some Preliminary Reflections on the Constitutive Act of the African Union*, 9 AFR. Y.B. INT'L L. 3, 38 (2001). For a brief discussion of the background to and analysis of article 4(h), see Ben Kioko, *The Right of Intervention Under the African Union's Constitutive Act: From Non-Interference to Non-Intervention*, 85 INT'L REV. RED CROSS 807 (2003).

232. *See generally* W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866 (1990); Rogier Bartels, *The Relationship Between International Humanitarian Law and the Notion of State Sovereignty*, 23 J. CONFLICT & SECURITY L. 461 (2018); Louis Henkin, *Human Rights and State "Sovereignty"*, 25 GA. J. INT'L & COMP. L. 31 (1995); Jack Donnelly, *State Sovereignty and International Human Rights*, 28 ETHICS & INT'L AFF. 225 (2014) (arguing that conceptions of sovereignty and territorial jurisdiction that were antagonistic to international human rights have become less absolutist and more human rights-friendly and that this trend is likely to continue).

rights of its own people, without external interference or criticism. In Jeremy Sarkin's words non-intervention is

yielding to two 'new' doctrines: humanitarian intervention and the responsibility to protect. . . . While some criticize R2P as eroding the equality between states and particularly the sovereignty of weaker ones, the doctrine continues to gain support and prominence in debates on the protection of individuals against shocking human rights abuses.<sup>233</sup>

In addition to the diminishing belief in absolute state sovereignty, Daniel Bethlehem suggests that the "tapestry of threads of practice"—composed of state practice; the R2P doctrine; the objectives of the UN in promoting and protecting human rights; and shifts in international human rights law, international humanitarian law, and international criminal law—supports the right of humanitarian intervention.<sup>234</sup> Others, like Chris O'Meara, hold that on a "close review, the threads of Bethlehem's tapestry argument are in fact inimical to a right of humanitarian intervention"<sup>235</sup>—as its "auto-determinative nature" allows it to be used a pretext for aggressive and unlawful breaches of a state's territorial integrity to advance the political or foreign policy objectives of the intervening state or group of states.<sup>236</sup> Like O'Meara, many international lawyers reject the claim that international law recognizes the permissibility of humanitarian intervention.<sup>237</sup> This is true even if they accept the R2P doctrine as distinct because it is "political" and reliant on authorization from the UNSC, under Chapter VII of the UN Charter as a matter of last resort, and therefore it is not a unilateral remedy.<sup>238</sup> In other words, although the nature of both internal and external sovereignty has changed in the post-war years, and sovereignty no longer provides states with a license to abuse human rights underneath an impermeable shell of protection, the concept of sovereignty and its practical implications remain strong. Unsurprisingly, Sarkin has observed that sovereignty "has been

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233. See Sarkin, *supra* note at 218, at 3.

234. Daniel Bethlehem, *Stepping Back a Moment—The Legal Basis in Favour of a Principle of Humanitarian Intervention*, EJIL: TALK! (Sept. 12, 2013), <https://www.ejiltalk.org/stepping-back-a-moment-the-legal-basis-in-favour-of-a-principle-of-humanitarian-intervention>.

235. O'Meara, *supra* note 220, at 443.

236. *Id.* at 464.

237. See, e.g., Nigel S. Rodley & Basak Cali, *Kosovo Revisited: Humanitarian Intervention on the Fault Lines of International Law*, 7 HUM. RTS. L. REV. 275, 295–97 (2007); Bruno Pommier, *The Use of Force to Protect Civilians and Humanitarian Action: The Case of Libya and Beyond*, 93 INT'L REV. RED CROSS 1063, 1067–69 (2011); Carsten Stahn, *Syria and the Semantics of Intervention, Aggression and Punishment: On "Red Lines" and "Blurred Lines"*, 11 J. INT'L CRIM. JUST. 955 (2013).

238. O'Meara, *supra* note 220, at 446.

eroded in recent years [but] is not discarded”—it “is an ever-evolving concept as opposed to having the fossilized status it was once thought to have.”<sup>239</sup>

The AU Constitutive Act also embraces the spirit of R2P, though it predates the introduction of R2P as a doctrine.<sup>240</sup> Two propositions underpin R2P: First, in the language of the report of the International Commission on Intervention and State Sovereignty (“ICISS”), is that each state “[must] respect the dignity and basic rights of all the people within the State.”<sup>241</sup> Second is that each state also “[has] the responsibility to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity.”<sup>242</sup> In sum, where a state fails in its responsibility to protect people within its territory, then, as a last resort, the international community may take collective forcible action through the UN to enforce this protection in a timely and decisive manner, on a case-by-case basis.<sup>243</sup> Essentially, R2P sets out a process through which the international community—in the context of political pluralism—aims to protect populations from ongoing atrocities and ameliorate the problems that give rise to such atrocities.<sup>244</sup> Yet even though, as argued above, the traditional view of state sovereignty has eroded, the majority view among international lawyers is that R2P has not yet emerged as an accepted international norm.

According to Jennifer Welsh, who examined the debate over R2P after the 2005 World Summit,<sup>245</sup> that is because R2P is perceived as a threat to the principle of sovereign equality and the international cooperation that ensues from it.<sup>246</sup> R2P would be more widely accepted if scholars emphasized human protection as the core objective of coordinated action and responses

239. See Sarkin, *supra* note 233, at 4.

240. See Dan Kuwali, *The End of Humanitarian Intervention: Evaluation of the African Union’s Right of Intervention*, 9 AFR. J. CONFLICT RESOL. 41, 47 (2002). This is true only to the extent that the responsibility to protect (“R2P”) was first proposed by an international commission in 2001 and adopted as a more limited political principle by the UN World Summit in 2005, five years after the adoption of the AU Constitutive Act. See G.A. Res. 60/1, 2005 World Summit Outcome (Sept. 16, 2005). However, the genesis of both article 4(h) and R2P lie in the failure of the international community to respond to the tragic events of the Rwanda genocide in 1994 and the Srebrenica massacre in 1995.

241. See INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY [ICISS], THE RESPONSIBILITY TO PROTECT ¶ 1.35 (2001).

242. See G.A. Res. A/RES/60/1, World Summit Outcome, ¶¶ 138–39 (Oct. 24, 2005).

243. O’Meara, *supra* note 220, at 446.

244. 2005 World Summit Outcome, *supra* note 240, ¶ 139.

245. See Jennifer M. Welsh, *Norm Contestation and R2P*, 5 GLOBAL RESPONSIBILITY TO PROTECT 365 (2013).

246. *Id.* at 395.

to ongoing atrocities, avoiding the specter of international hierarchy and external enforcement.<sup>247</sup> Echoing Welsh, Jason Ralph writes of R2P:

At its core there is a settled consensus underpinning its *proscriptive* element, which insists that acts of atrocity are wrong. [On] the other hand, the *prescriptive* element of R2P, which insists that States as members of the international community have a responsibility to protect foreign populations is less [clear].<sup>248</sup>

Before moving forward to discuss the AU's unique blend of these two concepts, I should recall that R2P is different from, though rooted in, humanitarian intervention, and that these doctrines should not be conflated in the analysis of article 4(h). It is important to remember, too, that the UN Security Council, consistent with its powers under Chapter VII of the Charter, is central to the process set out by the R2P norm.

## 2. Article 4(h) of the AU Constitutive Act

In the aftermath of the Rwanda genocide, when the UN Security Council failed to take successful action to save lives, African states found themselves asking: If not us, then who? This question was not far from the minds of the drafters of article 4(h) of the AU Constitutive Act, which unequivocally establishes a right of humanitarian intervention of an auto-determinative nature.<sup>249</sup> Consequently, when the OAU Member States decided to incorporate this norm into the foundational instrument of the

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247. *Id.*

248. Jason Ralph, *What Should be Done? Pragmatic Constructivist Ethics and the Responsibility to Protect*, 72 INT'L ORG. 173, 186 (2018). Ralph also argues that, from a pragmatic constructivist perspective, the R2P norm is susceptible to various meanings (e.g., "R2P as accountability," "R2P as humanitarian aid," "R2P as intervention," "R2P as prevention," "R2P as peace," or "R2P as asylum") depending on the context in which the norm is invoked (in the abstract) and applied, and so on. *Id.* at 194–96.

249. Discussions and analyses of the AU's right of intervention encapsulated in article 4(h) have variously addressed a number of questions, including how to implement the right; the threshold for invoking it; the practical, legal and procedural difficulties likely to arise in implementing it; and, only tangentially, the role of the UN Security Council. *See, e.g.*, Kioko, *supra* note 231, at 815–24 (discussing some of the legal and procedural aspects); *see also* DAN KUWALI, THE RESPONSIBILITY TO PROTECT: IMPLEMENTATION OF ARTICLE 4(H) INTERVENTION (2011) (providing a more extensive analysis of article 4(h)); AFRICA AND THE RESPONSIBILITY TO PROTECT: ARTICLE 4(H) OF THE AFRICAN UNION CONSTITUTIVE ACT (Dan Kuwali & Frans Viljoen eds., 2014); Suyash Paliwal, *The Primacy of Regional Organizations in International Peacekeeping: The African Example*, 51 VA. J. INT'L L. 185 (2011). *See generally* Sarkin, *supra* note 233; Tim Murithi, *The Responsibility to Protect, as Enshrined in Article 4 of the Constitutive Act of the African Union*, 16 AFR. SECURITY REV. 14 (2007); Martin Kunschak, *The African Union and the Right to Intervention: Is There a Need for UN Security Council Authorization?*, 31 S. AFR. Y.B. INT'L L. 195 (2006). This discussion will not deal with all of these questions.

OAU's successor organization, some political and academic commentators were concerned that a regional instrument was attempting to usurp the authority of the UN Security Council.<sup>250</sup> To date the AU has not *actually* intervened with military force in any situation under article 4(h) authorization, and the fear that the AU's Peace and Security Council would usurp the primacy of the UN Security Council has not materialized. In the single instance in which article 4(h) was invoked—in relation to Burundi—the AU reversed course without carrying out the threatened intervention.

To examine the criticisms of article 4(h) in more detail, it helps to turn to the Protocol Relating to the Establishment of the Peace and Security Council of the African Union.<sup>251</sup> In accordance with article 5(2) of the AU Constitutive Act, the Protocol establishes the operational structure to effectively implement the AU Assembly's decisions in the areas of conflict prevention, peace-making, peace support, operations and intervention, as well as peace-building and post-conflict reconstruction.<sup>252</sup> Under article 17(1) of the Protocol, AU Member States pledge that in fulfilment of the AU's mandate to promote and maintain peace and security in Africa, the AU's PSC will "cooperate and work closely with the United Nations Security Council, which has primary responsibility for the maintenance of international peace and security."<sup>253</sup> At first, this provision appears to mitigate concerns that AU Member States could use article 4(h) to intervene in other countries without following UN protocol. Yet the Protocol also states, in article 16(1), that the AU "has the primary responsibility for promoting peace, security and stability in Africa."<sup>254</sup> From this, one commentator has concluded that, despite the Protocol's repeated references to cooperation with the UN, it never actually states that the AU should seek the approval of the UNSC prior to intervention, and that it fails to clarify how the UNSC is viewed.<sup>255</sup>

Similarly, in his reading of the subsequent clauses of article 17, Jean Allain concluded that the relationship envisaged in article 17(1) between the PSC and the UN Security Council does not privilege the UN Security Council, or even place it on equal footing with the PSC.<sup>256</sup> Furthermore, he asserts that the Security Council is simply one of many UN bodies that the PSC is

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250. See generally Jean Allain, *The True Challenge to the United Nations System of the Use of Force: The Failures of Kosovo and Iraq and the Emergence of the African Union*, 8 MAX PLANCK Y.B. U.N. LAW 237, 264–89 (2004). But see O'Meara, *supra* note 220 (surprisingly failing to mention article 4(h) of the AU Constitutive Act or to refer to the developments in the AU in his incisive discussion on whether international law should recognize a right of humanitarian intervention).

251. AU Peace and Security Protocol, *supra* note 22.

252. *Id.* art. 3(a)–(c).

253. *Id.* art. 17(1).

254. *Id.* art. 16(1).

255. See Wyse, *supra* note 219, at 311.

256. See Allain, *supra* note 250, at 286.

supposed to work with closely, in an interaction that is to be first and foremost of a logistical nature.<sup>257</sup> He buttresses the latter point by noting that, in fact, article 17(2) does not speak of the need to seek UN Security Council authorization to use force, but instead permits states, where necessary, to request that the UN provide “the necessary financial, logistical and military support for the African Union’s activities in the maintenance of peace, security and stability in Africa.”<sup>258</sup> This is echoed by the diffusion and dilution of the primacy of the UN Security Council *vis-à-vis* the PSC in article 17(3) and (4), whose essence is that the role of the Security Council is to assist the PSC and not *vice versa*.<sup>259</sup> Thus, Allain is quite categorical that

[T]he fact that the Protocol, while paying lip-service to the primacy of the UN Security Council, seeks, at every turn, to dissipate its pre-eminence makes clear that intervention as envisioned by the Constitutive Act of the African Union usurps the ultimate control vested in the United Nations System over the use of force.<sup>260</sup>

Yet, as a practical matter, the intervening years since the adoption of the AU Constitutive Act in 2000 have confirmed the view that any intervention by the AU based on article 4(h) would not disregard the role and primacy of the UN Security Council altogether. It is inconceivable that, if the AU invokes article 17(1) of the Protocol, the UN would respond favorably to requests under 17(2) to provide financial, logistical, and military support before the Security Council addressed the issue of authorization of the use of force in the first instance. In fact, the AU itself clarified this matter in 2005 when the Executive Council adopted *The Common African Position on the Proposed Reform of the United Nations: “The Ezulwini Consensus.”*<sup>261</sup>

The “Ezulwini Consensus” is primarily a request for UN Security Council reform, as its title suggests. In this context, the AU confirmed the primacy of the UN Security Council in matters of collective security, including with regard to the responsibility to protect and the legality of the use of force.<sup>262</sup> Though the AU Executive Council insisted that since the General Assembly and the Security Council are often far from the scenes of conflicts and may not be in a position to effectively appreciate the nature and development of conflict situations, regional organizations in proximity to con-

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257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.* at 287.

261. African Union Executive Council, *The Common African Position on the Proposed Reform of the United Nations: “The Ezulwini Consensus”*, Doc. Ext/EX.CL/2 (VII) (Mar. 8, 2005).

262. *Id.* ¶ B(i).

licts must be empowered to take action,<sup>263</sup> it agreed that intervention by regional organizations should take place only with approval by the UN Security Council in scrupulous compliance with the provisions of article 51 of the UN Charter.<sup>264</sup> However, the Executive Council also concluded that in some situations, and in circumstances requiring urgent action, the Security Council could grant its approval *ex post facto*.<sup>265</sup> Finally, the Executive Council noted that “the obligation of states to protect their citizens . . . should not be used as a pretext to undermine the sovereignty, independence and territorial integrity of states.”<sup>266</sup> Accordingly, it reaffirmed the prohibition on any use of force outside the framework of article 51 and article 4(h) of the AU Constitutive Act.<sup>267</sup>

The AU Assembly endorsed the Executive Council’s recommendations at its Fifth Ordinary Session in July 2005, making “the Ezulwini Consensus” a formal AU policy decision.<sup>268</sup> This policy framework is not merely “either political maneuvering or a statement of what would be true if the UNSC were actually effective.”<sup>269</sup> Through article 4(h) and other sub-regional instruments and practices, Africa has created the world’s most legally coherent framework to combat conflict and regional insecurity and protect democracy.<sup>270</sup> As Jeremy Levitt writes, African states and organizations, historically the most conservative subscribers to the principles of state sovereignty, nonintervention, and territorial integrity, “today have adopted, operationalized, and acted under norm-creating mechanisms that are eroding

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263. *Id.*

264. *Id.* ¶ B(ii). Article 51 provides for the inherent right of individual or collective self-defense if an armed attack occurs against a Member State of the United Nations. It states: “Nothing in the present Charter shall impair the inherent right of individual and collective self-defence if an armed attack has occurred against a Member State of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.” U.N. Charter art. 51.

265. *Id.* ¶ B(i).

266. *Id.*

267. *Id.*

268. *See* African Union Assembly, Decision on the Expansion of the Follow-up Mechanism on the Reform of the United Nations, Dec. 87 (V), Sirte Declaration on the Reform of the United Nations at 1, Decl. 2 (V) (July 4–5, 2005).

269. *See* Wyse, *supra* note 219, at 312.

270. *See* Jeremy Levitt, *Pro-Democratic Intervention in Africa*, 24 WIS. INT’L L.J. 785, 832 (2006).

traditional prohibitions on the use of force enshrined in the UN Charter and general international law.”<sup>271</sup>

Levitt’s conclusions are informed by an examination of a number of pre- and post-AU Constitutive Act humanitarian and pro-democratic interventions (“PDI”) in member countries by the AU and two African sub-regional groups, ECOWAS and SADC.<sup>272</sup> According to Levitt, the data reflect that

Africa’s new interventionism (backed by hard law) [has] not only influenced State behavior inside and outside Africa; it has also added significant weight and shape to the development of the corpus of international law including the emerging norm of PDI and the doctrine of humanitarian intervention. Although it may be too early to claim that a right of PDI exists under customary international law, its recognition as a treaty-based right and one firmly established in customary regional law [in Africa] is both timely and futuristic.<sup>273</sup>

Levitt’s conclusions are not based exclusively on his reading of article 4(h). For example, prior to the adoption of the AU Constitutive Act, a sub-regional African organization, the Economic Community of West African States (“ECOWAS”) had intervened in Liberia and Sierra Leone in 1990<sup>274</sup> and 1998,<sup>275</sup> respectively, ostensibly on humanitarian grounds, without authorization by the UN Security Council. Undoubtedly, this was an obvious usurpation of article 53 of the UN Charter, which expressly stipulates that

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271. See Jeremy Levitt, *The Law on Intervention: Africa’s Pathbreaking Model*, 7 GLOBAL DIALOGUE 50, 51 (2005).

272. See Levitt, *supra* note 270, at 831–33.

273. *Id.*

274. In December 1989, a civil war broke out in Liberia. The horrific nature of the war and its implications for the country and its neighbors became apparent as Liberia’s natural, human, and material resources were devastated, and large numbers of Liberian refugees poured into other West African countries. When it became obvious that the United Nations and the wider international community, especially the United States (a traditional ally with historic ties to Liberia), was not going to intervene, Liberia’s sub-regional partners decided to intervene under the auspices of ECOWAS in August 1990. ECOWAS then set up the Cease-Fire Monitoring Group (“ECOMOG”). The ECOWAS intervention and its involvement in subsequent peacebuilding efforts lasted for a decade, until 1998. See generally Max A. Sesay, *Civil War and Collective Intervention in Liberia*, 23 REV. AFR. POL. ECON. 35 (1996).

275. On May 25, 1997, a military junta led by Major Johnny Paul Koroma overthrew the one-year-old elected government of President Ahmad Tejan Kabbah. After two days of fighting, the ousted president appealed to ECOWAS for military assistance to restore his government to power. In February 1998, a Nigerian-led ECOWAS force, ECOMOG, stationed in neighboring war-torn Liberia, entered into and recaptured Freetown, Sierra Leone’s capital city, driving out the military junta and restoring President Kabbah to power by the end of February. See generally L. F. Berger, *State Practice Evidence of the Humanitarian Intervention Doctrine: The ECOWAS Intervention in Sierra Leone*, 11 IND. INT’L & COMP. L. REV. 605 (2001).

no enforcement action shall be taken under regional agencies or by regional arrangements without authorization of the Security Council. Nevertheless, both interventions were subsequently praised, rather than condemned, by the Security Council.<sup>276</sup> However, while his point about Africa's new interventionism is valid within the context of the specific instances that he examines, the claim that it has influenced state behavior *outside* Africa seems premature and exaggerated—except to the extent that the UNSC's responses to Africa's interventionism have laid the groundwork for its responses to other interventions around the world.

Commenting on the ECOWAS interventions, Ben Kioko has aptly observed, “the UN Security Council has never complained about its powers being usurped,” apparently “because the interventions were in support of popular causes and were carried out partly because the UN Security Council had not taken action or was unlikely to do so at the time.”<sup>277</sup> The Security Council's *post hoc* validation of NATO's controversial intervention in Kosovo in 1999 followed the pattern of its response to African states, allowing a “regional” doctrine of intervention that overrides state sovereignty to protect human rights and democracy.<sup>278</sup> Thus, the late Thomas Franck, a leading scholar on the subject, asserted that the ECOWAS interventions “seemed to signal that the Council, in appropriate circumstances, could retroactively sanitize an action that may have been of doubtful legality at the time it was taken.”<sup>279</sup> In particular, it signaled to Franck that for “purely humanitarian” operations, regional organizations may “use force, even absent specific prior Security Council authorization, when that seem[s] the only way to respond to impending humanitarian disasters.”<sup>280</sup>

In essence, the Liberia incident may provide evidence that the *jus ad bellum* now has, or is developing, a standard that permits unilateral interventions.<sup>281</sup> The right of humanitarian intervention is now binding within the

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276. See S.C. Res. 788 (Nov. 19, 1992); S.C. Res. 1162 (Apr. 17, 1998).

277. See Kioko, *supra* note 231, at 821. Other scholars agree with Kioko's observation. See, e.g., Christian Walter, *Article 53*, in *THE UNITED NATIONS CHARTER: A COMMENTARY* 1478, 1501 (Bruno Simma et al. eds., 3d ed. 2012) (arguing that the Security Council had ample opportunity to authorize the intervention, but never did, and that, if anything, it seemed disinterested in authorizing the intervention, at least during the early stages of the conflict).

278. See generally SEAN MURPHY, *HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER* (1996) (providing a comprehensive analysis of various past cases); Thomas Franck, *Lessons of Kosovo*, 93 AM. J. INT'L L. 857, 859 (1999); David Wippman, *Kosovo and the Limits of International Law*, 25 FORDHAM INT'L L. J. 129 (2001).

279. THOMAS FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 156 (2002).

280. *Id.* at 162.

281. See, e.g., Jeremy Levitt, *Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone*, 12 TEMP. J. INT'L & COMP. L.J. 333, 347 (1998).

context of African regional international conventional law through article 4(h) of the AU Constitutive Act. However, the majority view at the international level is that the behavior of states does not evince such a standard. Monica Hakimi has noted that although states have periodically endorsed actions that can be characterized as unilateral humanitarian interventions, like the ECOWAS intervention in Liberia, most states have declined to support a general standard to that effect.<sup>282</sup> Consequently, through this provision, the African Union has made a potentially consequential normative contribution to the fabric of contemporary international law, adding to Bethlehem's "tapestry" of threads of international legal practice.

Defining the bounds of the right to intervention in practice is more difficult, and the application of the right has been inconsistent. The ICISS has characterized global humanitarian intervention as controversial both when it happens—as in Somalia, Bosnia and Kosovo—and when it fails to happen, as in Rwanda.<sup>283</sup> Since the adoption of the AU Constitutive Act, there have been at least four situations in which the AU could have invoked article 4(h) as a ground for intervening with force on humanitarian grounds: in Sudan

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282. Monica Hakimi, *The Jus Ad Bellum's Regulatory Form*, 112 AM. J. INT'L L. 151, 163, 176–78 (2018) (examining the ECOWAS intervention in Liberia, the role of the Security Council in the incident, and the arguments about the emergence of a standard permitting unilateral humanitarian intervention).

283. See ICISS, *supra* note 241, ¶¶ 1.1, 1.4 (2001).

(2004-2005),<sup>284</sup> Libya (2011),<sup>285</sup> the Central African Republic (2013-2015),<sup>286</sup> and Burundi (2016).<sup>287</sup>

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284. The widely debated conflict in Darfur, a region in western Sudan, started in early 2003 when non-Arab rebels from Darfur, frustrated with attacks on their land and convinced that their interests were not being represented in the ongoing peace talks between the Sudanese government in Khartoum and the southern rebels, the Sudan People's Liberation Army, launched a guerilla war on government forces. The government responded by launching a brutal counterinsurgency, in which Khartoum supplemented its own forces with proxy militias known as the *Janjaweed*. Over the subsequent years, the government forces and the militias committed numerous, grave violations of human rights and humanitarian law amounting to war crimes and crimes against humanity, and possibly to genocide or ethnic cleansing, which resulted in indictments of the former president of Sudan, Omar Al Bashir, and other top Sudanese officials, in 2009. See Nsongurua J. Udombana, *When Neutrality Is a Sin: The Darfur Crisis and the Crisis of Humanitarian Intervention in Sudan*, 27 HUM. RTS. Q. 1149 (2005) (arguing that the grave violations of human rights and humanitarian law in Darfur justified humanitarian military intervention by the international community, including the African Union).

285. The AU first discussed the Libyan crisis of 2011 during its Peace and Security Council meeting on Feb. 23, 2011. At the time, it decided that none of the crimes stipulated in article 4(h) had been committed. Subsequently, even as the situation in Libya deteriorated, the AU adopted an approach aimed at encouraging the Gaddafi regime to cease attacks on its own people rather than invoking its authority under article 4(h) to intervene unilaterally on humanitarian grounds. See Ademola Abass, *The African Union's Response to the Libyan Crisis: A Plea for Objectivity*, 7 AFR. J. LEG. STUD. 128, 137-38 (2014).

286. Tatiana Carayannis & Mignonne Fowles, *Lessons from African Union-United Nations Cooperation in Peace Operations in the Central African Republic*, 26 AFR. SEC. REV. 220 (examining the roles of the UN and the AU in resolving conflicts from 1997 to 2015, arguing that successive peace operations have lacked a clear political strategy; arguing that their mandates, troop deployments and leadership have not always been fit for purpose; and contextualizing the AU's inability to intervene effectively).

287. For several months leading up to December 2015, a crisis situation raged in Burundi, with deadly incidents of fighting and carnage not seen since the end of the country's intermittent civil war and political instability from 1993-2005. The AU feared the prospect of Burundi relapsing into another civil war. Consequently, on December 17, 2015, the PSC, invoking article 4(h), made the landmark decision to deploy a 5,000 strong force, the African Prevention and Protection Mission in Burundi (more commonly known by its French acronym MAPROBU). The invocation of article 4(h) was unprecedented. The PSC gave Burundi 96 hours in which to accept the deployment, failing which it would recommend that the AU Assembly authorize a military intervention under article 4(h), even without the government's consent. Due to a combination of factors—including opposition to MAPROBU, threats by the Burundi government to repel any AU intervention with force, and subsequent disagreement among members of the PSC—when the AU Assembly met at the level of heads of state and government on January 30-31, 2016, it decided not to support the proposed deployment. See Nina Wilen & Paul D. Williams, *The African Union and Coercive Diplomacy: The Case of Burundi*, 56 J. MOD. AFR. STUD. 673 (2018) (discussing the failed attempt by the AU to intervene in Burundi based on article 4(h) and analyzing the political, substantive and procedural factors behind the failure, including the Burundi government's astute diplomacy, the PSC's apparent mishandling of the issue, and the resistance of several African leaders to setting a precedent for future interventions where concerns about civilian protection might override state sovereignty).

The AU has had a limited presence in Darfur, but only as part of a combined UN-AU peacekeeping operation, the United Nations-African Union Hybrid Mission in Darfur. The AU's presence in Darfur is not, therefore, an intervention force under the authority of article 4(h).<sup>288</sup> And though the AU had an AU-led regional peacekeeping force in the Central African Republic, it was not an article 4(h) intervention force, but was rather conceived as a *peacekeeping* force to support the implementation of the Libreville Peace Agreement negotiated between the country's fragile transitional government and armed rebel groups.<sup>289</sup> (It was largely ineffective, leading the UN in 2014 to take over the peacekeeping operation.<sup>290</sup>) While it may be prudent not to draw a strong and generalized conclusion from these two situations, it is reasonable to say that they at least show how a combination of political, operational, and financial obstacles and a lack of political will and serious commitment on the part of AU Member States pose an obstacle to the future implementation of an otherwise well-intentioned principle. Realistically, with very limited financial and material resources to fund its humanitarian and peacekeeping activities, the AU will necessarily remain beholden to the goodwill of external partners—it will not be able to act unilaterally.

In sum, the AU Constitutive Act can claim credit for being the first regional legal instrument to confirm and codify the norm of humanitarian intervention,<sup>291</sup> despite uncertainty over whether the AU can, in practice, intervene unilaterally for humanitarian ends. As already noted above, the right of humanitarian intervention in the AU Constitutive Act is based on the fundamental value of respect for and protection of human life and human

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288. See Alex de Waal, *Darfur and the Failure of the Responsibility to Protect*, 83 INT'L AFF. 1039, 1054 (2007) (arguing, with respect to the conflict in Darfur, that the failure to achieve R2P there "owes much to the inadequate conceptualization of R2P").

289. Nathaniel Olin, *Pathologies of Peacekeeping and Peacebuilding in CAR*, in MAKING SENSE OF THE CENTRAL AFRICAN REPUBLIC 194, 211 (Tatiana Carayannis & Louisa Lombard eds., 2015).

290. S.C. Res. 2127, ¶¶ 3–4 (Dec. 5, 2013).

291. See Erika de Wet, *The Evolving Role of ECOWAS and the SADC in Peace Operations: A Challenge to the Primacy of the United Nations Security Council in Matters of Peace and Security?*, 27 LEIDEN J. INT'L L. 353, 369 (2014) (arguing that, in respect of the various interventions and military operations undertaken by ECOWAS in Côte d'Ivoire, Guinea, Liberia and Sierra Leone, and those undertaken by the SADC in Democratic Republic of the Congo and Lesotho, it seems premature to suggest that the practice of African sub-regional organizations amounts to the emergence of a new customary right to engage in "first-instance enforcement action"). I agree with the view that all of these interventions, which took place prior to the adoption of the AU Constitutive Act and at the behest of the respective sub-regional organizations, have not given rise to a new customary norm. *But see* Paliwal, *supra* note 249, at 220–21 (arguing that there now exists such a customary rule); Levitt, *supra* note 281 (asserting the existence of regional customary law in Africa for pro-democratic interventions). I find the claim about the existence of a new *customary* norm to be somewhat exaggerated, given the very limited instances of state practice on which the alleged customary rule is based, even for *regional* customary international law.

security. The African Union has taken the lead in codifying it as a treaty norm in contemporary international law, at least for the African region.

#### E. *Treaties Protecting the Rights of Specified Classes of Beneficiaries*

In the following sections, I turn to examples of AU human rights treaties that build upon the international human rights regime by expanding rights for particular groups in a uniquely African way. I briefly discuss three of these treaties—on the rights of the child, women’s rights, and IDPs—which are all in force.<sup>292</sup> Two other treaties belonging to this category were adopted more recently and are not yet in force, so they are not discussed here.<sup>293</sup>

##### 1. African Charter on the Rights and Welfare of the Child (1990)

The UN General Assembly adopted the Convention on the Rights of the Child (“CRC”), and opened it for signature, on November 20, 1989.<sup>294</sup> African states were grossly unrepresented in the CRC’s negotiation.

Only three African States participated for at least five of the nine years that the working group took to drive the final proposal. This is the lowest percentage of all continents, contrasting sharply with west European (61% of the continental potential) and even Latin American (29%) participation over a similar period.<sup>295</sup>

By the time the negotiations for the CRC were drawing to an end, African countries were instead engaged in their own negotiations, under the auspices of the OAU, for a regional instrument aimed at the protection of the rights of children in Africa. Within seven months of the adoption of the CRC, the OAU adopted the African Children’s Rights Charter.<sup>296</sup>

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292. However, as with the three major treaties discussed in Part II, I do not examine the related issues of practice and implementation of these treaties. In part, this is due to constraints of space; but, more importantly, it is an acknowledgement that such an examination requires a more empirical methodology than that employed in this article. This is an important question, and one which I believe would shed better light on the actual practice of African states and its contribution to the development of international law through their regional treaty relations. As such, the question deserves an entirely separate study.

293. I refer here to the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Older Persons, adopted Jan. 31, 2016 by the AU Assembly at its Twenty-Sixth Ordinary Session; and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa, adopted Jan. 29, 2018, by the AU Assembly at its Thirtieth Ordinary Session.

294. CRC, *supra* note 15.

295. *Id.* at 200.

296. African Children’s Rights Charter, *supra* note 15.

Its origins go back to 1979. In that year, the OAU Assembly of Heads of State and Government adopted the Declaration on the Rights and Welfare of the Child during its Sixteenth Ordinary Session held in Monrovia, Liberia.<sup>297</sup> During the same summit, the OAU Assembly adopted a resolution (“Decision on Human and Peoples’ Rights in Africa”) calling for the creation of a committee of experts to draft a continent-wide human rights instrument.<sup>298</sup> The Assembly’s ultimate objective was the adoption of an instrument similar to those that already existed in Europe (the European Convention on Human Rights) and the Americas (the American Convention on Human Rights).<sup>299</sup> Neither the Declaration on the Rights and Welfare of the Child nor the Decision on Human and Peoples’ Rights in Africa expressly called for the adoption of an instrument on the rights of the child, but there can be no doubt that the subsequent adoption of the African Children’s Rights Charter has its genesis in these developments—as it calls for the “[protection] of the rights of the woman and the child as stipulated in international declarations and conventions” in its article 18(3).<sup>300</sup>

The African Children’s Rights Charter is one of the primary examples of an instrument adopted by an African regional organization to *supplement* a global instrument adopted under the auspices of the UN. The OAU purportedly adopted it to plug perceived gaps in the CRC and to address the specificities of the condition of the African child. Lee Muthoga, for example, has broadly observed that the idea of adopting an instrument on the rights of the child in Africa “originated from a desire to address certain peculiarly African problems” which had not been addressed by the CRC.<sup>301</sup> Frans Viljoen has identified the gaps in the CRC with specificity: the situation of children living under apartheid; disadvantages facing the African girl child; African conceptions of the community’s responsibilities and duties;

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297. OAU, Declaration on the Rights and Welfare of the African Child, AHG/ST.4 (XVI) Rev.1 (July 20, 1979).

298. OAU, Decision on Human and Peoples’ Rights in Africa, Res. AHG/Dec.115 (XVI) (July 20, 1979).

299. Resolution 115 (XVI), *id.*, invited the OAU Secretary-General to organize in an African capital as soon as possible “a restricted meeting of highly qualified experts to prepare a preliminary draft ‘African Charter of Human and Peoples’ Rights providing *inter alia* for the establishment of bodies to promote and protect human and peoples’ rights.” Ultimately, the requested experts became a body known as the African Commission on Human and Peoples’ Rights, established under the African Charter.

300. Article 18(3) of the African Charter on Human and Peoples’ Rights, *supra* note 17, provides: “The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.”

301. Lee G. Muthoga, *Analysis of International Instruments for the Protection of the Rights of the Child*, in INTERNATIONAL CONFERENCE ON THE RIGHTS OF THE CHILD: PAPERS AND REPORTS OF A CONFERENCE CONVENED BY THE COMMUNITY LAW CENTRE, UNIVERSITY OF THE WESTERN CAPE 124 (Community Law Centre ed., 1992).

the role of the extended family in the upbringing of children; the problem of child soldiers; and the situation of child refugees and internally displaced children resulting from internal armed conflicts.<sup>302</sup> Thus, as Chris Peter and Ummu Mwalimu capture this sentiment,

the African Charter seeks to complement the UN Convention on the Rights of the Child, taking into account social and cultural values of Africa and offering protection against violations of children's rights. It combines African values with international norms by proclaiming collective rights and individual duties. These include the duty of individuals to their family, community and State. The uniqueness of the Charter is to be found in the originality of its normative content.<sup>303</sup>

The following are five of the most salient normative innovations of the African Children's Rights Charter:<sup>304</sup> Firstly, unlike the CRC, the African Children's Rights Charter internationalizes the age of majority within the African region at eighteen years: Article 2 simply defines a child as "every human being below the age of 18 years."<sup>305</sup> It thereby impliedly prohibits any State Party from reducing that age by domestic legislation. By contrast, Article 1 of the CRC provides for the possibility of a lower age of majority where domestic legislation allows.<sup>306</sup>

Secondly, because of this definition, the African Children's Rights Charter also sets a higher standard than the CRC for the age at which children can be recruited for and participate in armed conflict.<sup>307</sup> This age was

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302. Frans Viljoen, *Supra-national Human Rights Instruments for the Protection of Children in Africa: The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child*, 31 COMP. & INT'L L. J. SOUTHERN AFR. 199, 206 (1998).

303. Chris Peter & Ummu Mwalimu, *The African Charter on the Rights and Welfare of the Child*, in THE AFRICAN UNION: LEGAL AND INSTITUTIONAL FRAMEWORK 477, 480 (Abdulqawi Yusuf & Fatsah Ouguergouz eds., 2012).

304. A full examination of the various normative aspects of this instrument would require a more comprehensive discussion than this brief survey. For some extended analyses of the African Children's Rights Charter in comparison with the CRC, see Benyam D. Memzur, *The African Children's Charter Versus the UN Convention on the Rights of the Child: A Zero-Sum Game?*, 28 SA PUB. L. 1 (2008); Thoko Kaime, *The Foundations of Rights in the African Charter on the Rights and Welfare of the Child: A Historical and Philosophical Account*, 3 AFR. J. LEG. STUD. 120 (2009).

305. African Children's Rights Charter, *supra* note 15, art. 2.

306. See CRC, *supra* note 15, art. 1 (defining a child as "a human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier").

307. Compare African Children's Rights Charter, *supra* note 15, art. 22(2) (prohibiting the participation of anyone under the age of eighteen in armed conflict or hostilities), with art. 2, and CRC, *supra* note 15, art. 38(3) (setting the minimum age at which a person may be recruited into armed forces at fifteen). The Optional Protocol to the Convention on the Rights of the Child of 2000 prohibits persons under the age of eighteen from taking direct part in armed

reportedly one of the major points of contention during the elaboration of the CRC.<sup>308</sup> Commentators have pointed out that the endemic phenomenon of child soldiers in armed conflicts in Africa, which came to the fore in the Liberian and Sierra Leonean civil wars in the 1990s, was the motivating consideration behind the inclusion of article 22(2) in the African Children's Rights Charter.<sup>309</sup>

Thirdly, the African Children's Rights Charter requires States Parties, *inter alia*, to take special measures in respect of female, gifted, and disadvantaged children and to ensure equal access to education for all sections of the community.<sup>310</sup> There are no such provisions in the CRC. And while the CRC and the African Children's Rights Charter both afford protection to refugee children, the latter goes further, by extending protection to internally displaced children as well,<sup>311</sup> in line with African states' concerns over the plight of IDPs in the international refugee law context, discussed below.

Fourthly, the African Children's Rights Charter includes a couple of provisions that depart from similar provisions in the CRC or are not provided for at all in the latter. Article 30, which deals with children of imprisoned mothers, offers a notable example.<sup>312</sup> The aim here is clearly to ensure that even in circumstances that call for incarceration of criminal offenders,

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hostilities and from compulsory recruitment. However, it permits voluntary recruitment for persons under eighteen. G.A. Res. 54/263, art. 3 (Mar. 16, 2001).

308. Karen McSweeney, *The Potential for Enforcement of the United Nations Convention on the Rights of the Child: The Need to Improve the Information Base*, 16 B.C. INT'L & COMP. L. REV. 467, 472–74 (1993).

309. See, e.g., Yusuf, *supra* note 99, at 525. The scale of the problem of child soldiers in Africa—which has been prevalent in armed conflicts in the Central African Republic, the Democratic Republic of the Congo, Liberia, Sierra Leone, South Sudan, Sudan, and Uganda—was at the center of the International Criminal Court case involving the Congolese warlord Thomas Lubanga. See generally *Prosecutor v. Dyilo*, ICC-01/04-01/06. On Mar. 14, 2012, Mr. Lubanga was convicted of committing, as co-perpetrator, war crimes consisting of enlisting and conscripting of children under the age of fifteen years and was sentenced to a total of fourteen years of imprisonment. See Rome Statute of the International Criminal Court art. 8(2)(b)(xxvi) and (e)(vii), July 17, 1998, 2187 U.N.T.S. 90 (requiring children to be older than fifteen to be conscripted or enlisted or used to participate actively in hostilities). The verdict and the sentence were confirmed by the Appeals Chamber of the ICC. See *Prosecutor v. Dyilo*, ICC-01/04-01/06-3122, Judgement of The Appeals Chamber (Dec. 1, 2014).

310. African Children's Rights Charter, *supra* note 15, art. 11(3)(e).

311. *Id.* art. 23(4).

312. *Id.* art. 30 (“States Parties to the present Charter shall undertake to provide special treatment to expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law and shall in particular: (a) ensure that a non-custodial sentence will always be first considered when sentencing such mothers; (b) establish and promote measures alternative to institutional confinement for the treatment of such mothers; (c) establish special alternative institutions for holding such mothers; (d) ensure that a mother shall not be imprisoned with her child; (e) ensure that a death sentence shall not be imposed on such mothers; (f) the essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation.”).

young children are not separated from their mothers. This provision—which requires States Parties to consider the imposition of non-custodial and alternative criminal sentences for pregnant mothers and mothers of infants and young children and prohibits the death sentence for such mothers—is innovative, especially in its treatment of the death penalty. The child is not considered to be merely an individual entity but a part of the integral family.<sup>313</sup> Another example is the provision prohibiting child marriages.<sup>314</sup>

Finally, the African Children's Rights Charter follows the lead in the CRC in one important respect, by indirectly prohibiting female genital mutilation. Although article 21(1) does not mention female genital mutilation in as many words,<sup>315</sup> one cannot doubt that its prohibition of harmful cultural practices cracks down on this practice,<sup>316</sup> which continues to be prevalent in parts of Africa.<sup>317</sup> This provision thus reinforces the prohibition in article 24(3) of the CRC, which stipulates that “States shall take all effective ap-

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313. Yusuf, *supra* note 99, at 525.

314. African Children's Rights Charter, *supra* note 15, art. 21(2). Because of differences in the definition of a child, it is possible to interpret the Convention on the Rights of the Child as not prohibiting child marriage in circumstances where the age of majority is attained below the age of eighteen, whereas a combined reading of articles 2 and 21(3) of the African Children's Rights Charter suggests that any marriage under the age of eighteen is a child marriage and thus not allowed. This is as far as the theory goes; the reality is that child marriages continue to be common practice in most African communities, even in states that are parties to the African Children's Rights Charter. A recent study has concluded that although marriage before eighteen has become less common throughout much of sub-Saharan Africa, high levels of child marriage persist in the region despite legislative efforts to prevent the practice, with West Africa having the highest prevalence. See Alissa Koski, Shelley Clark & Arijit Nandi, *Has Child Marriage Declined in Sub-Saharan Africa? An Analysis of Trends in 31 Countries*, 43 POPULATION & DEV. REV. 7, 25–26 (2017). See generally Judith-Ann Walker, *Early Marriage in Africa—Trends, Harmful Effects and Interventions*, 16 AFR. J. REPROD. HEALTH 231 (2012).

315. Cf. The Protocol on the Rights of Women, *supra* note 17 (“States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognized international standards. States Parties shall take all necessary legislative and other measures to eliminate such practices, including prohibiting: . . . (b) through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them.”).

316. See African Children's Rights Charter, *supra* note 15, arts. 1(3), 21(1).

317. It is commonly acknowledged that this practice continues to be one of the most harmful forms of violence against young women and girls and a serious abuse of their rights in some parts of Africa, the Middle East, and Asia. See generally Elizabeth H. Boyle & Kristin Carbone-López, *Movement Frames and African Women's Explanations for Opposing Female Genital Cutting*, 47 INT'L J. COMP. SOC. 435 (2006); L. Amede Obiora, *Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision*, 47 CASE W. RES. L. REV. 275 (1997).

propriate measures with a view to abolishing traditional practices prejudicial to the health of children.”<sup>318</sup>

Two other aspects of the African Children’s Rights Charter bear pointing out. First, the African Children’s Rights Charter follows the African Charter on Human and People’s Rights in providing for responsibilities or duties owed by the child towards his “family and society, the State and other legally recognized communities and the international community.”<sup>319</sup> The enumerated duties are: working for the cohesion of the family; serving his national community; preserving and strengthening African cultural values; preserving and strengthening social and national solidarity; preserving and strengthening the independence and the integrity of his country; and contributing to the promotion and achievement of African unity at all times and at all levels.<sup>320</sup> The prescription of duties in an instrument ascribing rights is a peculiarity shared with the African Charter on Human and Peoples’ Rights.<sup>321</sup> Though otherwise unusual in rights-granting instruments, in articulating individual duties, both of these instruments were following article 29(1) of the UDHR, which provides that all people have duties to the community that allows the free and full development of their personalities.

Secondly, and most importantly, article 1(2) of the African Children’s Rights Charter obligates States Parties to ensure that nothing in the Charter shall affect any provisions contained in their national legislation or in any other international treaty in force in that State. This is not permission to disregard the Charter. Instead, this provision ensures that the rights encoded in the African Children’s Rights Charter may be understood, as Abdulqawi Yusuf puts it, “[as] the minimum standard rights and shall not hinder the effectiveness of rights contained in other instruments which grant a higher level of [protection].”<sup>322</sup> This enhances the character of the African Chil-

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318. While there is a subtle difference in the language used in the two conventions, “harmful cultural practices” versus “traditional practices prejudicial to the health of children,” both provisions have been interpreted by the respective treaty bodies of both conventions and other UN human rights bodies as implying a prohibition of female genital mutilation. *See, e.g.,* UN Committee on the Elimination of Discrimination against Women and UN Committee on the Rights of the Child, Joint General Recommendation No. 31 of Committee on the Elimination of Discrimination Against Women/General, Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices, CEDAW/C/GC/31-CRC/C/GC/18, Para. VI.A. (Nov. 14, 2014).

319. *See* African Children’s Rights Charter, *supra* note 15, art. 31.

320. *Id.*, art. 31(a)–(f).

321. *See, e.g., generally* Makau Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 VA. J. INT’L L. 339 (1995); Kofi Quashigah, *Scope of Individual Duties in the African Charter*, in *THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM: 30 YEARS AFTER THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS* 119, 199 (Manisuli Ssenyonjo ed., 2011).

322. Yusuf, *supra* note 99, at 526.

dren's Rights Charter as a "regional counterpart and supplementary treaty" to the UN's Convention on the Rights of the Child.

The regional norms contained in this treaty could conceivably provide a template for future regional instruments for the protection of children's rights in other parts of the world, where children may face some of the same problems faced by African children that the CRC may not sufficiently cover.

## 2. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003)

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the "Protocol on Women's Rights in Africa"), adopted on July 2, 2003, entered into force on November 25, 2005. It was adopted as a response to what most advocates for human rights in Africa generally, and most advocates for women's rights specifically, regarded as the inadequate protection for women under article 18(3) of the African Charter. A common criticism of that provision is that by placing women under the umbrella of the family—along with other vulnerable groups such as the aged, the disabled and children—the African Charter failed to establish a more comprehensive framework to protect the human rights of African women.<sup>323</sup>

The Protocol on Women's Rights in Africa is, like the African Children's Rights Charter, a supplementary treaty in two senses. First, it responds not only to the inadequacy of the African Charter but also of the UN Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"),<sup>324</sup> and to African states' failure to implement the women's rights contained in those two instruments. Second, it purports to contribute to the creation of certain rights specific to African women, taking into consideration their social and cultural contexts.

Among the rights the Protocol provides to women are health and reproductive rights, including a circumscribed right to medical abortion,<sup>325</sup> the right to self-protection; the right to be protected against sexually transmitted

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323. See Rachel Mayanja, *The Protocol on the Rights of Women in Africa*, in THE AFRICAN UNION: LEGAL AND INSTITUTIONAL FRAMEWORK: A MANUAL ON THE PAN-AFRICAN ORGANIZATION 455, 457 (Abdulqawi Yusuf & Fatsah Ouguergouz eds., 2012); see also Fareda Banda, *Blazing a Trail: The African Protocol on Women's Rights Comes into Force*, 50 J. AFR. L. 72 (2006).

324. Kristin Davis, *The Emperor Is Still Naked: Why the Protocol on the Rights of Women in Africa Leaves Women Exposed to More Discrimination*, 42 VAND. J. TRANSNAT'L L. 949, 958 (2009).

325. See Protocol on the Rights of Women in Africa, *supra* note 17, art. 14(2) (requiring States Parties to authorize abortion in cases of sexual assault, rape, incest, and where a continued pregnancy threatens the health of the mother and the life of the fetus).

diseases, including HIV/AIDS,<sup>326</sup> and the right to know the HIV/AIDS status of their sexual partners. The Protocol on the Rights of Women in Africa is the first treaty to provide for these specific rights, but these are only a few examples of its unique and innovative characteristics. Other provisions reiterate the need for the protection of women in armed conflict,<sup>327</sup> women refugees,<sup>328</sup> and “women in distress”—a group uniquely recognized and protected by the Protocol that consists namely of poor women, women heads of families from marginalized population groups, pregnant or nursing women, and women in detention.<sup>329</sup>

Two kinds of scholarly responses have arisen around the Protocol. There is criticism that the Protocol has failed to live up to the promise of eradicating discrimination against African women.<sup>330</sup> There are also concerns that it fails to articulate a clear and consistent African approach to women’s rights, and that it is difficult to reconcile with the existing body of human rights jurisprudence developed under the African Charter on Human and Peoples’ Rights and the African Charter on the Rights and Welfare of the Child.<sup>331</sup>

On the other hand, most commentators who have compared the two instruments would easily agree with Viljoen’s conclusion that “[the Protocol] speaks in a clearer voice about issues of particular concern to African women, locates CEDAW in African reality, and returns into its fold some casualties of quests for a global consensus, resulting from the adoption of CEDAW.”<sup>332</sup> Beyond rooting the rights of CEDAW in the African context, scholars and women’s rights advocates have lauded the Protocol for expanding the scope of protected rights beyond those provided under CEDAW, and dealing with rights already covered in CEDAW with greater specificity.<sup>333</sup> It

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326. *Id.* Article 14(1)(d) provides for “the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS,” and article 14(1)(e) provides for “the right to be informed on one’s health status and on the health status of one’s partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices.”

327. *Id.* art. 11.

328. *Id.* art. 11(3).

329. *Id.* art. 24.

330. See Danwood Chirwa, *Reclaiming (WO)Manity: The Merits and Demerits of the African Protocol on Women’s Rights*, 53 NETHERLANDS INT’L L. REV. 63 (2006); Davis, *supra* note 324.

331. Chirwa, *supra* note 330.

332. Frans Viljoen, *An Introduction to the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa*, 16 WASH. & LEE J. CIV. RTS. & SOC. JUST. 11, 21 (2009). See also Mayanja, *supra* note 323, at 461; Yusuf, *supra* note 99, at 529.

333. See, e.g., Kaniye S. Ebeku, *A New Hope for African Women: Overview of Africa’s Protocol on Women’s Rights*, 13 NORDIC J. AFR. STUD. 264 (2004); Banda, *supra* note 323; Ebenezer Durojaye & Lucyline Nkatha Murungi, *The African Women’s Protocol and Sexual Rights*, 18 INT’L J. HUM. RTS. 881 (2014); see also Melinda Adams & Alice Kang, *Regional*

remains to be seen whether other regional human rights regimes will follow the example set by African States by elaborating regional instruments for the protection of the rights of women.

### 3. AU Convention for the Protection and Assistance of Internally Displaced Persons (2009)

The last African instrument selected for discussion in this article is also the most recent African regional instrument. As with the African Charter on Children's Rights and the Protocol on Women's Rights in Africa, the discussion of this treaty will be brief, focusing on its salient features. The AU adopted the African Union Convention for the Protection and Assistance of Internally Displaced Persons (the "Kampala Convention") in 2009.<sup>334</sup> This treaty has historic significance: It is the first and only continent-wide treaty on internally displaced persons ("IDPs") ever adopted.<sup>335</sup> It may thus set a template for a future UN treaty on IDPs.

In the absence of a binding universal instrument governing the situation of IDPs, states have relied on *ad hoc* extensions of the UNHCR's protective mandate and on the UN Guiding Principles on Internal Displacement (the "Guiding Principles," also called the "Deng Principles"), which are considered non-binding soft law.<sup>336</sup> As is widely acknowledged, collectively Africa

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*Advocacy Networks and the Protocol on the Rights of Women in Africa*, 3 POL. & GENDER 451 (2007) (discussing the role of African regional advocacy networks in creating the Protocol and shaping its content).

334. Kampala Convention, *supra* note 14.

335. No other region outside Africa has adopted a regional or sub-regional binding treaty specifically governing the status of IDPs. Only the Latin American and Caribbean regions have adopted non-binding instruments relating, in part, to IDPs. *See e.g.*, Comm. of Int'l Conference on Central American Refugees, Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America (Jan. 1990); San José Declaration on Refugees and Displaced Person, *supra* note 131; Brazil Declaration and Plan of Action: Roadmap to Strengthen Protection and Promote Sustainable Solutions for Refugees, Displaced Persons and Stateless Persons in Latin America and the Caribbean within a Framework of Cooperation and Solidarity (Dec. 2014), <https://www.refworld.org/pdfid/5487065b4.pdf>.

336. U.N. Comm'n on Human Rights, *Guiding Principles on Internal Displacement*, U.N. Doc. E/CN.4/1998/53/Add.2 (1998) [hereinafter Guiding Principles]. The Guiding Principles were prepared at the request of the Commission by the Representative of the Secretary-General on Internally Displaced Persons, Francis Deng. *See* Roberta Cohen, *The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting*, 10 GLOBAL GOVERNANCE 459, 460–69 (2004) (discussion of the legislative history). Mr. Deng submitted his first report to the Commission in 1993. *See* U.N. Comm'n on Human Rights, U.N. Doc. E/CN.4/1993/35 (1993). Subsequently, with the help of a team of international legal scholars chaired by Professor Walter Kälin, Mr. Deng developed a document setting out the relevant law and addressing the grey areas and gaps; *see* U.N. Comm'n on Human Rights, U.N. Doc. E/CN.4/1996/52/ (1996); U.N. Comm'n on Human Rights, E/CN.4/1996/52/Add.2 (1996) (the legislative history). The resulting Guiding Principles were presented to the Com-

has hosted the largest number of both refugees and IDPs for a long time. Consequently, Africa has looked for solutions. A sub-regional agreement adopted by a group of east and central African states preceded the AU's adoption of the Kampala Convention. On December 15, 2006, some eleven heads of state and government, operating under the auspices of the International Conference on the Great Lakes Region ("ICGLR"), signed a Pact on Security, Stability and Development in the Great Lakes Region. The Protocol on the Protection and Assistance to Internally Displaced Persons (the "IDP Protocol") was one of several protocols signed as part of the Pact.<sup>337</sup> Later, the Kampala Convention entered into force in 2010, just over a year after its adoption, the shortest period in which any AU or OUA treaty has entered into force, except for the AU Constitutive Act itself. Arguably, this indicates the importance and sense of urgency that African States attach to the problem of IDPs (and refugees more generally).

Both the Kampala Convention and the IDP Protocol recognize the relevance of the Guiding Principles and draw from them.<sup>338</sup> However, the IDP

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mission at its fifty-fourth session (Mar. 16–Apr. 24, 1998). U.N. Comm'n on Human Rights, U.N. Doc. E/CN.4/1998/53/Add.2 (1998).

337. Kampala Convention, *supra* note 14. The ten ICGLR Member States that originally signed the protocol are Angola, Burundi, the Central African Republic, the Democratic Republic of the Congo, Kenya, the Republic of Congo, Rwanda, Sudan, Tanzania, Uganda and Zambia. South Sudan joined the ICGLR on Sept. 8, 2012 during its Third Extraordinary Summit. For background on and membership of the ICGLR, see Patrick Kanyangara, *The International Conference on the Great Lakes Region as a Peacebuilding Instrument for Civil Society Organizations*, AFRICAN CENTRE FOR THE CONSTRUCTIVE RESOLUTION OF DISPUTES (June 15, 2016), <https://www.acCORD.org.za/publication/international-conference-great-lakes-region-peacebuilding-instrument-civil-society-organisations>.

338. In fact, the IDP Protocol gives cardinal prominence to the Guiding Principles in its objectives. Article 2 of the IDP Protocol provides that:

[T]he objectives of the Protocol are to:

1. Establish a legal framework in the Great Lakes Region for ensuring the adoption and implementation by Member States of the Guiding Principles on Internal Displacement;
2. Ensure legal protection by Member States of the physical safety and material needs of internally displaced persons in accordance with the Guiding Principles;
3. Provide a legal basis for the domestication of the Guiding Principles into national legislation by Member States;
4. Commit Member States to prevent and eliminate the root causes of displacement.

Further, in article 6 (Adoption and Implementation of the Guiding Principles), Member States undertake to adopt and implement the Guiding Principles and to use the "Annotations of the Guiding Principles on Internal Displacement" (*see infra* note 340) as an authoritative source for interpreting the application of the Guiding Principles. International Conference on the Great Lakes Region, Protocol on the Protection and Assistance to Internally Displaced Persons, Nov. 30, 2006, <https://www.refworld.org/docid/52384fe44.html>.

Protocol is more explicit and substantive in its incorporation of the Guiding Principles. Whereas the Kampala Convention refers to the Guiding Principles only once, in its preamble,<sup>339</sup> the IDP Protocol explicitly mentions them some twenty times. Still, both of these instruments—the sub-regional protocol and the continental treaty—acknowledge the claim that “the Guiding Principles reflect and are consistent with international human rights law and international humanitarian law and thus to a large extent codify and make explicit guarantees protecting internally displaced persons that are inherent in these bodies of law.”<sup>340</sup> By incorporating the Guiding Principles explicitly or implicitly, the IDP Protocol and the Kampala Convention serve the transformative role of establishing a firm international legal framework for IDPs.

Indeed, the Kampala Convention goes beyond the Guiding Principles to significantly advance international norms, in particular international humanitarian law norms, on internal displacement. The normative character and attributes of the Kampala Convention have already been the subject of scholarly commentaries,<sup>341</sup> but suffice it to say that the Kampala Convention imposes on States Parties duties to: (a) protect people from arbitrary displacement;<sup>342</sup> (b) provide protection of the human rights of IDPs and respect international humanitarian law regarding protection of IDPs during displacement;<sup>343</sup> (c) seek durable solutions for IDPs;<sup>344</sup> (d) ensure assistance to IDPs and facilitate unimpeded access to IDPs by humanitarian organizations and personnel;<sup>345</sup> and (e) prohibit armed groups from obstructing access to

339. Kampala Convention, *supra* note 14, pmb. (“Recognizing the inherent rights of internally displaced persons as provided for and protected in international human rights and international humanitarian law and as set out in the 1998 United Nations Guiding Principles on Internal Displacement, which are recognized as an important international framework for the protection of internally displaced persons.”).

340. See WALTER KÄLIN, *THE GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT: ANNOTATIONS* viii (2008).

341. See, e.g., MEHARI T. MARU, *THE KAMPALA CONVENTION AND ITS CONTRIBUTIONS TO INTERNATIONAL LAW* (2014); Allehone M. Abebe, *The African Union Convention on Internally Displaced Persons: Its Codification Background, Scope, and Enforcement Challenges*, 29 REFUGEE SURVEY Q. 28 (2010); Flavia Zorzi Giustiniani, *New Hopes and Challenges for the Protection of IDPs in Africa: The Kampala Convention for the Protection and Assistance of Internally Displaced Persons in Africa*, 39 DENV. J. INT’L L. & POL’Y 347 (2011); Laurence Juma, *Narrative of Vulnerability and Deprivation in Protection Regimes for the Internally Displaced Persons (IDPs) in Africa: An Appraisal of the Kampala Convention*, 16 LAW DEMOCRACY & DEV. 219 (2012); Won Kidane, *Managing Forced Displacement by Law in Africa: The Role of the New African Union IDPs Convention*, 44 VAND. J. TRANSNAT’L L. 1 (2011); Stephane Ojeda, *The Kampala Convention on Internally Displaced Persons: Some International Humanitarian Law Aspects*, 29 REFUGEE SURVEY Q. 58 (2010).

342. Kampala Convention, *supra* note 14, arts. 1(a), 4(1), 4(4).

343. *Id.* arts. 1(d)–(e).

344. *Id.* art. 2(e).

345. *Id.* arts. 1(j), 5.

IDPs, carrying out arbitrary displacement, and violating the rights of IDPs or the civilian and humanitarian character of the places where IDPs are sheltered.<sup>346</sup>

Two of the most significant normative advances in the Kampala Convention are the prohibition of arbitrary displacement and the increased state responsibility for internal displacement that does occur.<sup>347</sup> As Mike Asplet and Megan Bradley note, prohibitions on arbitrary displacement are not new to international law. On the contrary both the Fourth Geneva Convention and the Statute of the International Criminal Tribunal for the Former Yugoslavia prohibited “individual or mass forcible transfers” and “unlawful transfers.”<sup>348</sup> The Kampala Convention goes beyond both by not only prohibiting arbitrary displacement, but also demanding accountability for internal displacement from States Parties as well non-state actors, such as non-state armed groups, which may arguably include private military or security companies.<sup>349</sup> The reach of the Kampala Convention therefore undoubtedly goes beyond the traditional, state-focused international human rights law, and expands the scope of the applicability of international humanitarian law. Accordingly, Asplet and Bradley observe that

in outlining the right to protection from arbitrary displacement, the Kampala Convention goes beyond these delineations and their reflection in the Guiding Principles. [These] provisions, clearly influenced by human rights law, have no counterpart in other IDP frameworks to date. [These] provisions represent a very broad approach to the prevention of forced migration, one intended to capture any arbitrary displacement.<sup>350</sup>

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346. *Id.* art. 7.

347. See Mike Asplet & Megan Bradley, *Strengthened Protection for Internally Displaced Persons in Africa: The Kampala Convention Comes into Force*, ASIL INSIGHTS (Dec. 7, 2012), <https://www.asil.org/insights/volume/16/issue/36/strengthened-protection-internally-displaced-persons-africa-kampala>.

348. *Id.* (referencing both the Geneva Convention (IV) Relative to the Protection of Civilians in Time of War art. 49, Aug. 12, 1949, 973 U.N.T.S. 75; S.C. Res. 827, Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 2(g) (May 23, 1993) and the Rome Statute of the International Criminal Court art. 7(1)(d), July 17, 1998, 2187 U.N.T.S. 90). However, an analogy to the Rome Statute, Court lists forcible transfers as an act that may qualify for a crime against humanity, is not appropriate because the individual or mass forcible transfers referred to here are not necessarily arbitrary displacements.

349. This is based on the combined reading of article 1(e), which defines “armed groups” as “dissident armed forces or other organized armed groups that are distinct from the armed forces of the states,” and article 1(n), which defines non-state actors as “private actors who are not public officials of the state, including other armed groups [whose] acts cannot be attributed to the state.” See *id.* arts. 1(e), 1(n).

350. *Id.*

The Convention also casts a wider net than refugee law by placing a protection obligation on those African states *hosting* the IDPs, not just on the state of the IDP's nationality.<sup>351</sup> It also includes all causes of displacement such as armed conflict,<sup>352</sup> unrest or generalized violence and human rights violations,<sup>353</sup> natural and human-made disasters,<sup>354</sup> and even situations in which the IDPs were forced out of their places of habitual residence due to infrastructure development, like the building of dams.<sup>355</sup>

The reach of the Kampala Convention undoubtedly expands the scope of international humanitarian law. Mehari Maru has rightly noted that the Kampala Convention “[positions] Africa at the forefront of international norm-setting and legal development in one of the most controversial areas in international law, the governance of displacement.”<sup>356</sup> However, perhaps the most powerful testimony with which to conclude this brief examination of the Kampala Convention comes from the President of the International Committee of the Red Cross, who welcomed the adoption of the Convention and celebrated it for filling protective gaps left by the UN Refugee Convention and improving international law in many respects.<sup>357</sup>

### III. AFRICAN CONTRIBUTIONS BEYOND REGIONAL TREATIES: A BRIEF EXCURSUS

There is no question that, but for a couple of exceptions,<sup>358</sup> all current African states emerged from colonialism into a pre-existing international legal order that was shaped prior to their existence as independent sovereign states and, at least formally, as equal members of the international community. This is both a fact and a legacy of the history of colonial appropriation and subjugation of African peoples and territories by European powers. In

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351. MARU, *supra* note 341, at 13.

352. Kampala Convention, *supra* note 14, art. 4(4)(b).

353. *Id.* art. 4(4)(d).

354. *Id.* art. 4(4)(f).

355. *Id.* art. 10.

356. *Id.*

357. Jakob Kellenberger, *Root Causes and Prevention of Internal Displacement: The ICRC Perspective*, INT'L COMM. OF THE RED CROSS (Oct. 23, 2009), <https://www.icrc.org/eng/resources/documents/statement/displacement-statement-231009.htm> (“[The] Convention goes further than international humanitarian law treaties in some aspects, for example in the rules it contains on safe and voluntary return, and on access to compensation or other forms of reparation. This is of course very positive in terms of enhancing the protection of IDPs.”).

358. The exceptions are Ethiopia and Liberia, which were never colonized. But even these entities, along with other non-European regions of the world, were never regarded as part of the international community that claimed to be the progenitors of international law, at least not until they became members of the League of Nations in 1920.

this sense, at independence the new African states joined the international community as norm-takers—largely taking, and subjected to, international law as they found it.

Yet since then, in the identifiable areas discussed in Part II and below, African states have also become norm-shapers and norm-creators. These new African-generated norms, to the extent subscribed to by African states themselves, constitute what one may describe as regional international law in Africa. But within the wider universe of international law, the notion of African states as norm-shapers makes sense only if the norms created by African states are followed by other states beyond Africa—for example, through standards that other countries adopt or embrace as valid contributions.

Thus far, this article has presented selected examples of OAU and AU treaties that articulate rules and principles of international law developed or reaffirmed and expanded by African States. A full assessment of the contribution of African States to the development of international law requires also examining those non-binding OAU and AU resolutions and declarations relevant to Africa's role in the development of international law. In this section, I very briefly open this discussion for others by providing examples of how the articulation of African common positions in OAU and AU instruments, contemporaneous with negotiations undertaken under the auspices of other international organizations or fora, has influenced the development of international law.

As already noted, as legally non-binding instruments, OAU and AU resolutions and declarations do not create international law as such. Nevertheless, they may possess the character of international soft law instruments that, in time, indirectly contribute to the international law-making process. For example, the regional norms advanced by African countries may lower or enhance universally agreed standards (*e.g.*, establishing human rights norms and human rights protection). Or they may increase or reduce incoherence and disorder in the international system (*e.g.*, in the relationship between the AU Peace and Security Council and the UN Security Council, which some commentators thought might be problematic in the context of article 4(h) of the AU Constitutive Act). Ultimately, the significance of the contributions of African states rests on the positive normative value they bring to UN international law-making processes.

The compromises struck in the UN Convention on the Law of the Sea (“UNCLOS”)<sup>359</sup> are an example of African countries, along with other like-minded states, advancing common positions that shaped international law through the law-making processes of the UN at a time when the customary law status of the claimed norms was debatable, if not altogether non-

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359. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

existent.<sup>360</sup> One of the sticking points during the UNCLOS negotiations concerned the right of access to the sea for land-locked states under the new Law of the Sea.<sup>361</sup> The demands of the land-locked states—presented at the various stages leading to the negotiations that culminated in the Third UN Conference on the Law of the Sea (“UNCLOS III”), which ran from 1973 to 1982—were essentially three-fold.

First, that they be granted a right of access to and from the sea; second, that the international community in general recognize this right; and third, that that right not be dependent on the conclusion of additional bilateral agreements with transit and coastal states. This original negotiating position was contained in a series of “Draft Articles” relating to land-locked states submitted by Afghanistan, Bolivia, Czechoslovakia, Hungary, Mali, Nepal, and Zambia, on behalf of other land-locked states.<sup>362</sup> African land-locked states subsequently made an effort to present a united negotiating position within UNCLOS on the right of access,<sup>363</sup> and on May 24, 1973, the OAU

360. See, e.g., STEPHEN C. VASCIANNIE, LAND-LOCKED AND GEOGRAPHICALLY DISADVANTAGED STATES IN THE INTERNATIONAL LAW OF THE SEA 208–09 (1990). Some scholars have expressed the view that UNCLOS as a whole, or some of its provisions generally, reflect customary international law. See, e.g., Patricia C. Bauerlein, *The United Nations Convention on the Law of the Sea & U.S. Ocean Environmental Practice: Are We Complying with International Law?*, 17 LOY. L.A. INT’L & COMP. L. REV. 899, 922 (1995) (asserting that UNCLOS “is now international law. As such, parties are bound by the obligations and duties imposed by the ‘constitution for the oceans’ . . . . Arguably, even States that have not formally ratified the treaty are bound due to its status as *customary international law*.”) (emphasis added); see also J. Ashley Roach, *Today’s Customary International Law of the Sea*, 45 OCEAN DEV. & INT’L L. 239 (2014). In my view, at the time of their adoption, the provisions of article 125 in Part X of UNCLOS could not be regarded as an expression of existing customary international law, nor even as categorical evidence of an emerging customary rule. And until the provisions in question crystallize into norms of customary law through repeated adoption in the practice of states, the claim that the right of access has become part of the *lex generalis publicum* will remain untenable.

361. Other equally significant issues in these negotiations related to, for example, the right of access of land-locked states (“LLS”) to the living resources in the exclusive economic zone of coastal states and to the non-living resources of the continental shelf, as well as the outer limit of the continental shelf, high seas, and so on. All these issues concern, in part, the recognition and ascription of rights of access to, and exploitation of, the resources of the seas among coastal and non-coastal states, as well as coastal but geographically disadvantaged states (“GDS”) in the areas of fishing, navigation, deep sea-bed mining, aquatic food production, etc. See generally REMBE, *supra* note 8; Penelope S. Ferreira, *The Role of African States in the Development of the Law of the Sea at the Third United Nations Conference*, 7 OCEAN DEV. & INT’L L. 89 (1979); A. MPAZI SINJELA, LAND-LOCKED STATES AND THE UNCLOS REGIME (1983) (discussing the African negotiating positions during UNCLOS III).

362. See Revised Blue Paper on the Question of Access of Land-Locked and Geographically Disadvantaged States, U.N. Doc. A/CONF.62/C.2/L.33 (1976).

363. See THIRD U.N. CONFERENCE ON LAW OF THE SEA—SECOND COMMITTEE, Gambia, Ghana, Ivory Coast, Kenya, Lesotho, Liberia, Libyan Arab Republic, Madagascar, Mali, Mauritania, Morocco, Senegal, Sierra Leone, Sudan, Tunisia, United Republic of Cameroon, United Republic of Tanzania and Zaire: Draft Articles on the Exclusive Economic Zone, U.N.

Council of Ministers adopted the OAU Declaration on the Issues of the Law of the Sea.<sup>364</sup> In exchange for a right of access for land-locked states, the OAU Declaration resolved certain marine resource issues in favor of African coastal states, allowing them to rapidly extend their sovereignty, up to a limit of 200 nautical miles, over the natural resources of the high seas adjacent to their territorial waters up to the limits of their continental shelf.<sup>365</sup>

The Council readopted the Declaration as the Resolution on the Law of the Sea during its twenty-third ordinary session held in Mogadishu, Somalia, from June 6 to 11, 1974.<sup>366</sup> The resolution adopted an amendment to operative paragraph 2 of the Declaration of 1973 stating that: "African States recognize the right of access to and from the sea by the landlocked countries and the inclusion of such a provision in the Universal Treaty to be negotiated at the Law of the Sea Conference."<sup>367</sup> The Declaration on the Issues of the Law of the Sea, as amended in Mogadishu, was submitted to UNCLOS III as the common position of OAU members. As Myron Nordquist has aptly noted,

[t]hese meetings [by states to develop common positions] had a profound impact on the actual UNCLOS negotiation. For instance, the OAU Declaration and the Santo Domingo Declaration were the sources of various proposals and draft articles which were introduced in the subsequent Conference sessions.<sup>368</sup>

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Doc. A/Conf.62/C.2/L.82 (Aug. 26, 1974). The proposal was co-sponsored by both coastal and landlocked states.

364. OAU, Declaration on the Issues of the Law of the Sea, Doc. CM/St.11 – 9 (XXI) (May 1973); *see also* UNCLOS, Declaration of the Organization of African Unity on the Issues of the Law of the Sea, U.N. Doc. A/CONF.62/33, at 64 (July 19, 1974).

365. *See* OAU, Declaration on the Issues of the Law of the Sea, *supra* note 364, ¶ B.7 (Exclusive Economic Zone Concept Including Exclusive Fisheries Zone). The Declaration was adopted unanimously, meaning it was supported by coastal states too. *See also* UNCLOS, Declaration of the Organization of African Unity on the Issues of the Law of the Sea, *supra* note 364, at 64, sect. B, para. 7; TAYO O. AKINTOBA, AFRICAN STATES AND CONTEMPORARY INTERNATIONAL LAW: A CASE STUDY OF THE 1982 LAW OF THE SEA CONVENTION AND THE EXCLUSIVE ECONOMIC ZONE 76–77 (1996).

366. OAU, CM/Res.384 (XXVIII), Resolution on the Law of the Sea (1975).

367. The text of the Declaration before the amendment read: "African States *endorse the principle of* the right of access to and from the sea by the landlocked *African* countries, and the inclusion of such a provision in the Universal Treaty to be negotiated *by* the Law of the Sea Conference." OAU, Declaration on the Issues of the Law of the Sea, *supra* note 364, ¶ A.3 (Territorial Sea and Straits) (emphasis on amended words).

368. CTR. FOR OCEANS LAW AND POLICY, UNIV. OF VA., 1 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY at 59 (Myron H. Nordquist ed., 1985).

The provisions eventually incorporated in UNCLOS article 125 reflected the compromises in Mogadishu.<sup>369</sup> On the one hand, article 125 appears to recognize a general right of access; yet, at the same time, it places emphasis on bilateral or regional negotiations as the practical arrangements for the enjoyment and exercise of the right by land-locked states.

African States have occasionally replicated the approach of advancing common positions relating to the adoption of new global treaty norms in subsequent multilateral negotiations within the UN and other fora. By doing so, they have made contributions, reflecting their collective views, to various aspects of international law-making in a number of areas. Examples include international trade law, during the negotiations for the Marrakesh Agreement Establishing the World Trade Organization (WTO) of 1994,<sup>370</sup> and international criminal law, in the context of the negotiation and elaboration of the Rome Statute of the International Criminal Court of 1998.<sup>371</sup> The impact of the participation of African states in shaping the Uruguay Round negotiations, which resulted in the adoption of the Marrakech Agreement and the founding of the WTO, has been a matter of debate. It is fair to say that their overall impact on shaping the emerging trade norms was not as consequential as their contribution to the negotiations for UNCLOS was.<sup>372</sup> On the other hand, the impact of African States on the elaboration of the Rome Statute is generally regarded as successful. More recently, and just as significantly, African states have positively contributed to the ongoing development of international environmental law. Along with other like-

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369. Tiyajana Maluwa, *Southern African Land-Locked States and Rights of Access Under the New Law of the Sea*, 10 INT'L J. MARINE & COASTAL L. 529, 541 (1995).

370. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

371. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3.

372. See Yash Tandon, *The World Trade Organization and Africa's Marginalization*, 53 AUSTL. J. INT'L AFF. 83, 84 (1999) (positing that one of the constraints on the ability of African states to participate effectively in the WTO negotiations may have been lack of resources and staff, which meant that some African states could not attend every meeting, given that there were often multiple meetings taking place at the same time). As regards the participation of Third World nations, of which African states form the largest contingent, in the negotiations for the WTO, Ruth Gordon has observed that:

Unlike the founding of GATT, Third World nations played a somewhat significant role in the creation of the WTO. Entities that were colonies in 1947 were sovereign States and thus at least legally entitled to sit at the negotiating table as the WTO was created. Yet their actual participation and influence during the Uruguay Round has been the subject of debate, as has their capacity to participate effectively in the WTO. Despite language that appears to be more sympathetic to the concerns of Third World nations, the panoply of agreements that established the WTO reflect the lack of power and influence these States possessed during the negotiations.

Ruth Gordon, *Sub-Saharan Africa and the Brave New World of WTO Multilateral Trade Regime*, 8 BERKELEY J. AFR.-AM. L. & POL'Y 79, 93-94 (2006) (internal citations omitted).

mind states, such as the members of the Group of 77 and China, African states adopted common positions in the negotiations leading to the adoption of the Paris Agreement on Climate Change in 2015, and they have continued to do so in subsequent negotiations for its implementation.<sup>373</sup>

#### IV. CONCLUSION

Through the AU, and previously the OAU, African countries have adopted multilateral treaties that have enriched the scope of international law by complementing corresponding universal instruments with additional rules and principles. At the very least, these contributions signify the emergence of a regional African international law, or a public law of Africa. But although often these rules and principles are only applicable among the African States Parties to the particular treaties, they have the capacity to make an impact on future developments in international law outside the African regional context. African states are also incorporating their regional perspectives into international law instruments—mostly conventions adopted under the auspices of the UN—and into the international discourses leading to normative developments in certain areas of international law.

It is, of course, important to pay attention to the counter-narratives and norm-contestations opposing these emerging norms, and to the non-implementation of some of the norms by the norm-creators themselves, as this might signify a certain ambivalence or caution. It is possible that the narrow specificity of the treaty rights discussed here, while laudable, will limit their rights' effective implementation.<sup>374</sup> Moreover, the widespread failure among African states to incorporate these treaty provisions into domestic law creates a disjuncture between what the states have committed to under the treaties (institutional policy) and the state practice that follows the adoption of these treaties (*usus*), and it may suggest a lack of *opinio juris* in favor of the newly recognized norms.

Nonetheless, these developments, in my view, ultimately represent a rise, rather than a decline, of the international rule of law. The selected normative developments from African multilateral treaty practice discussed in this article represent a positive contribution to the development of interna-

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373. Convention on Climate Change, Paris Agreement on Climate Change, Jan. 29, 2016, U.N. Doc. FCCC/CP/2015/10/Add. 1. See Fabien Tondel et al., *Africa and Europe Combatting Climate Change: Towards a Common Agenda in 2015* (European Centre for Development Policy Management, Discussion Paper No. 177, 2015), [www.ecdpm.org/dp177](http://www.ecdpm.org/dp177) (analyzing Africa's engagement in international climate policymaking and collaboration on a common agenda with Europe prior to the Paris Climate Change Conference).

374. See, e.g., Davis, *supra* note 324, at 966, 984–91 (arguing that the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa risks overspecificity in multiple provisions, which will limit the effective implementation of some rights and could effectively prevent the instrument from meeting future needs).

tional law, and that is as it should be. To this point, it may be apt to conclude—while recognizing that this is an ongoing conversation—with a quotation from Yusuf’s reflection on this issue:

An important vector of diversity in the future of international law will be that of *regional diversity*. The application, interpretation and creation of international law by regional organizations and regional courts are likely to provide a key impetus in the development and evolution of international law.<sup>375</sup>

This is an important insight, given the skepticism that continues to accompany discussions of the proper role of the postcolonial periphery in the scheme of international law today and the lingering ambivalence of some regions in accepting international law and institutions.<sup>376</sup> The embrace of regional diversity in international law gives more visibility to the innovative norms developed by African states, without the negative connotations that some commentators associate with the saying famously attributed to Pliny the Elder: *ex Africa semper aliquid novi*.<sup>377</sup> Africa’s positive contribution to the development of modern international law and its continuing engagement with it provide a counterpoint to many narratives about Africa and what comes out of it. The fact that African states, through the AU and previously the OAU, are ready to push the boundaries of international law to protect their own agenda and interests cannot be overemphasized. It is a testament to the changing geographies of international law-making.

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375. Yusuf, *supra* note 99, at 535 (emphasis in the original).

376. See, e.g., Simon Chesterman, *Asia’s Ambivalence About International Law and Institutions: Past, Present and Futures*, 27 *EURO. J. INT’L L.* 945 (2016).

377. Gaius Plinius Secundus, the Roman administrator and author commonly known as Pliny the Elder, is credited with coining the phrase (usually translated as “Out of Africa there is always something new,” or “There is always something new from Africa”). Italo Ronca, *Ex Africa Semper Aliquid Noui: The Ever Surprising Vicissitudes of a Pre-Aristotelian Proverb*, 53 *LATOMUS* 570 (1994). However, some commentators have noted that Pliny’s statement was itself a later adaptation of an ancient Greek saying (“Africa always produces something new”) that was first associated with Aristotle. See, e.g., Harvey Feinberg & Joseph Solodow, *Out of Africa*, 43 *J. AFR. HIST.* 255, 258 (2002) (tracing the transmission of the quotation from its origins to fourth century BC Greece and noting the connection between Aristotle’s original formulation of the phrase and Pliny’s in *PLINY, NATURAL HISTORY, VIII.42, translated by John Bostock & Henry Riley* (1855)).

APPENDIX  
STATUS OF RELEVANT OAU/AU TREATIES DISCUSSED  
(AS OF DECEMBER 31, 2019)

NAME OF COUNTRY	TREATY NO.					
	I	II	III	IV	V	VI
Algeria	X	X	X	X	X	
Angola	X	X	X	X	X	X
Benin	X	X	X	X	X	X
Botswana	X	X	X	X		
Burkina Faso	X	X	X	X	X	X
Burundi	X	X	X	X	S	S
Cameroon	X	X	X	X	X	X
Cape Verde	X	X	X	X	X	
Cent. African Rep.	X	X	X	X	S	X
Chad	X	X	X	X	S	X
Comoros	X	X	X	X	X	S
Congo	X	X	X	X	X	X
Côte d'Ivoire	X	X	X	X	X	X
Dem. Rep. of the Congo	X	X	S	X	X	S
Djibouti	S	X	X	X	X	X
Egypt	X	X	X	X		
Equatorial Guinea	X	X	X	X	X	S
Eritrea		X	X	X	S	S
Eswatini	X	X	X	X	X	X
Ethiopia	X	X	X	X	S	S
Gabon	X	X	X	X	X	X
Gambia	X	X	X	X	X	X
Ghana	X	X	X	X	X	S
Guinea	X	X	X	X	X	S
Guinea-Bissau	X	X	X	X	X	X
Kenya	X	X	X	X	X	
Lesotho	X	X	X	X	X	X
Liberia	X	X	X	X	X	X
Libya	X	X	X	X	X	
Madagascar	S	X	X	X	S	S

NAME OF COUNTRY	TREATY NO.					
	I	II	III	IV	V	VI
Malawi	X	X	X	X	X	X
Mali	X	X	X	X	X	X
Mauritania	X	X	X	X	X	X
Mauritius	S	X	X	X	X	
Morocco				X		
Mozambique	X	X	X	X	X	S
Namibia	S	X	X	X	X	S
Niger	X	X	X	X	S	X
Nigeria	X	X	X	X	X	X
Rwanda	X	X	X	X	X	X
Sahrawi Arab D.R.		X	S	X	S	X
Sao Tome & Principe	S	X	S	X	S	S
Senegal	X	X	X	X	X	S
Seychelles	X	X	X	X	X	
Sierra Leone	X	X	X	X	X	X
Somalia	S	X	S	X	S	S
South Africa	X	X	X	X	X	
South Sudan	X	X	S	X	S	S
Sudan	X	X	X	X	S	
Tanzania	X	X	X	X	X	S
Togo	X	X	X	X	X	X
Tunisia	X	X	S	X	X	S
Uganda	X	X	X	X	X	X
Zambia	X	X	X	X	X	X
Zimbabwe	X	X	X	X	X	X

**KEY:**

- X: Ratification or accession.
- S: Signature not yet followed by ratification.
  
- I. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969)
- II. African Charter on Human and Peoples' Rights (1981)
- III. African Charter on the Rights and Welfare of the Child (1990)
- IV. Constitutive Act of the African Union (2000)
- V. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003)
- VI. AU Convention for the Protection and Assistance of Internally Displaced Persons (2009)

