

The African Commission on Human and Peoples' Rights and the promotion and protection of refugees' rights

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Summary

African countries have been host to and have produced refugees for decades. These refugees have fled their countries for various reasons, including political and religious reasons. Many African countries are party to the 1951 United Nations Convention Relating to the Status of Refugees and its additional Protocol of 1967. In 1969, the Organisation of African Unity¹ Convention Governing the Specific Aspects of Refugee Problems in Africa, the major instrument that deals with the rights and duties of refugees in Africa, was adopted to address, as the name suggests, the specific aspects of refugee problems in Africa which were not addressed by the 1951 UN Refugee Convention. The African Commission on Human and Peoples' Rights has put in place various measures to promote and protect the rights of refugees in Africa. These measures include the organisation of seminars, seminar paper presentations by commissioners, the appointment of a Special Rapporteur on Refugees, Asylum Seekers,

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¹ The Organisation of African Unity was replaced by the African Union. For a comprehensive discussion of the history and functioning of the Organisation of African Unity and African Union, see F Viljoen *International human rights law in Africa* (2007) 157-234.

Migrants and Internally Displaced Persons in Africa, and adopting resolutions on the rights of refugees. The African Commission has also allied itself with various international human rights and humanitarian law organisations to protect the rights of refugees in Africa. It has protected the rights of refugees through its visits to different countries and through its decisions on individual communications. This article observes, inter alia, that, although the African Commission has entertained various communications dealing with the rights of refugees in Africa, the arguments of the parties to those communications as well as the decisions of the Commission have largely focused on the African Charter on Human and Peoples' Rights and not on the 1969 OAU Convention on Refugees. The author recommends that, in matters relating to refugee' rights, the African Commission should always invoke the provisions of the 1969 OAU Refugee Convention in addition to the African Charter and, where need be, reference should be made to other refugee-related instruments.

1 Introduction

African countries have been host to and the producers of refugees for a long period of time.² Although in Africa '[r]efugees were initially considered generously as one of the consequences of the fight against colonialism',³ there are now various factors contributing to people fleeing their countries. These factors include political, social and economic problems; religious and ethnic tensions and internal conflicts; liberation struggles, civil wars and coups d'état.⁴ In December 2008, the United Nations High Commissioner for Refugees (UNHCR) reported that by the end of 2007, Africa, the poorest continent in the world, was hosting the largest number of refugees (22%) after Asia (55%).⁵ Both natural disasters (such as floods, drought and other calamities) and man-made ones (such as civil wars) have been responsible for displacing thousands of people in various African countries. Africa has been host to many dictatorial regimes that have caused many people to find it impossible to live in their countries of nationality and hence seek asylum in other countries because of persecution.

² IC Jackson *The refugee concept in group situations* (1999) 143-176.

³ R Murray 'Refugees and internally displaced persons and human rights: The African system' (2005) 24 *Refugee Survey Quarterly* 56.

⁴ See OS Oyelade 'A critique of the rights of refugees under the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa' (2006) 12 *East African Journal of Peace and Human Rights* 164-168.

⁵ UNHCR *Statistical yearbook 2007: Trends in displacement, protection and solutions* (December 2008) 7 <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?id=4981c4812&tbl=STATISTICS> (accessed 2 February 2009).

This article looks at the measures the African Commission on Human and Peoples' Rights (African Commission) has adopted to promote and protect the rights of refugees in Africa in the light of the Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention), the 1951 UN Convention Relating to the Status of Refugees (1951 UN Refugee Convention) and the 1967 Protocol Relating to the Status of Refugees (1967 Protocol), as well as under the African Charter on Human and Peoples' Rights (African Charter). The author concludes that the African Commission has relied more on the African Charter than on the OAU Refugee Convention and calls upon the African Commission to always invoke the provisions of the latter instrument in addition to other relevant instruments in protecting and promoting the rights of refugees in Africa.

2 Putting the legal regime in place

As early as 1964, African countries realised that some countries, such as Uganda, Burundi and Tanzania, were facing problems related to hosting refugees and that the international community was not paying sufficient attention to the problems these countries and the refugees they were hosting faced. The OAU Council of Ministers appointed the Commission on the Problems of Refugees in Africa,⁶ which wrote a report on the problems of refugees in the above countries that it had visited.

After looking at the findings of the 1964 Commission on refugee problems in the above countries, the OAU Council passed a resolution that, among other things, called upon 'the African Group at the United Nations with the help of the Asian and other interested groups' to submit a resolution to the UN General Assembly calling upon the UNHCR to increase the assistance it was giving to refugees in Africa and also 'invite[d] the Commission to draw up a Draft Convention covering all aspects of the problems of refugees in Africa' and requested the Administrative Secretary-General 'to circulate the draft Convention to member states of the OAU for their comments and observations'.⁷

It was hoped that the OAU Refugee Convention would complement the 1951 UN Refugee Convention and that the former would be

⁶ Resolution CM/Res 19(II).

⁷ Resolution CM/Res 36(III) 1964, paras 4-8.

dedicated to governing 'the specifically African aspects of the refugee problem'.⁸ Murray states that:⁹

Feeling that the circumstances of Africans were insufficiently considered in the existing international instruments, in particular the 1951 UN Convention on Refugees, the OAU moved towards the creation of its treaty.

The adoption of the OAU Refugee Convention could therefore be interpreted to mean that African countries were of the view that the 1951 UN Refugee Convention did not sufficiently address some of the unique problems that refugees in Africa and African refugee-hosting countries were facing. Hence, the OAU deemed it necessary to come up with a convention that would deal with those problems. Put differently, African countries were convinced that the 1951 Refugee Convention was not designed with an African-specific approach in mind and thus was of less relevance to African refugee problems. One of these problems was that of mass influx of refugees.

The 1951 UN Refugee Convention was not designed to address the problem of people fleeing in big numbers as is often the case with African refugees, but rather to deal with individuals who are being persecuted or had a well-founded fear that they would be persecuted by their countries. This explains why, when the UNHCR started dealing with African refugees in the 1960s, it had to rely on its 'good offices' under General Assembly Resolution 1673 (XVI) of 18 December 1961 rather than on the definition of a refugee under article 1 of the 1951 UN Refugee Convention. While speaking of the 'good offices' and the implications of General Assembly Resolution 1673(XVI) of 18 December 1961 and how it was meant to deal with African refugees whose characteristics were never contemplated by the drafters of the 1951 UN Refugee Convention, the High Commission for Refugees said:¹⁰

Having regard to the refugee definition [in the 1951 UN Refugee Convention], eligibility can only be *finally* determined after an examination of each individual case. Here, however, we were confronted with refugees dispersed in the African bush and the absence of the necessary administrative structures made it impossible to screen each individual case in order to determine whether they met the criteria of the Statute.

⁸ Resolution CM/Res 88(VII), 1966. It has been observed that '[t]he growing refugee problem in Africa led to the emergence of a regional refugee instrument, the ... (OAU) Refugee Convention. This contained a broader refugee definition that took into account the possibility of mass influx and generalised fears of violence. However, Deputy High Commissioner Sadruddin Aga Khan spoke with relief when the OAU decided that African states, though members of the OAU Refugee Convention, still needed to accede to the 1951 Convention. He declared that this demonstrated that the Convention had become "more universally recognised" — implying, of course, that it was not before.' See SE Davies 'Redundant or essential? How politics shaped the outcome of the 1967 Protocol' (2007) 19 *International Journal of Refugee Law* 703 718.

⁹ Murray (n 3 above) 57.

¹⁰ Jackson (n 2 above) 107.

This meant that the 1951 UN Refugee Convention definition ignored the unique nature of the refugee problem including factors that force people to flee their countries on the African continent. When people flee in big numbers, they are more likely to be associated with many problems as opposed to those who flee individually, and hence the need for different approaches to deal with the different problems that crop up. Some of the problems associated with a mass influx of people are that they become a burden to the financial resources of the host country and they can easily organise themselves and form a rebel group to destabilise their country of origin. This was clearly expressed by the Tanzanian government while defending itself before the African Commission in *Association pour la Sauvegarde de la Paix au Burundi v Kenya, Rwanda, Tanzania, Uganda, Zaire and Zambia*.¹¹ It could also explain why article 23(2) of the African Charter specifically prohibits asylum seekers and refugees from using their countries of asylum to engage in subversive activities against their countries of origin. Refugees can also be a source of insecurity to the nationals who live near them.¹² The OAU was determined to ensure that the measures adopted to regulate refugees in Africa were designed ‘to improve the living conditions of the refugees and to help them lead a normal life’.¹³

2.1 The OAU Refugee Convention and the definition of a refugee: An unnecessary step?

The OAU Refugee Convention was adopted after extensive consultations with African countries.¹⁴ At the time of writing, the OAU Refugee Convention had been ratified or acceded to by most of the African countries, apart from the following nine countries: Djibouti, Eritrea, Madagascar, Mauritius, Namibia, Sahrawi Arab Democratic Republic, Somalia and São Tomé and Príncipe.¹⁵

¹¹ (2003) AHRLR 111 (ACHPR 2003) para 26, where it is observed that ‘[i]n reaction to the allegation of violation of article 23(2) of the Charter, Tanzania states [that] “it has never granted shelter to terrorists fighting against Burundi. However, Tanzania admits that it has always welcomed in its territory streams of refugees from Rwanda and Burundi each time trouble flares up in those two countries. Tanzania has always refused to serve as a rear base or staging post for any armed movement against its neighbours. Leaders of political parties and factions are welcomed in Tanzania just like other refugees are. But they are not allowed to carry out military activity against Burundi from Tanzanian territory”.

¹² Resolution CM/Res 104 (IX) 1967.

¹³ Resolution CM/Res 149 (XI) 1968.

¹⁴ As above.

¹⁵ See <http://www.africa-union.org/root/au/Documents/Treaties>List/Convention%20on%20Refugees.pdf> (accessed 4 February 2009). It should be noted that, although the following countries had not yet ratified the OAU Refugee Convention, they had signed it: Somalia (1969); Madagascar (1969); Mauritius (1969); and Djibouti (2005).

African states that are parties to the OAU Refugee Convention are requested to 'implement it in a spirit as liberal as possible'.¹⁶ The Convention establishes various principles that govern refugees in Africa. Some of them will be discussed when an analysis of the jurisprudence of the African Commission that relates to refugees is done below, whilst others have been discussed by some scholars.¹⁷ The OAU Refugee Convention, in defining a refugee, adopts *verbatim* the definition of a refugee under the 1951 UN Refugee Convention read together with the 1967 Protocol (there is already a plethora of literature on the 1951 UN Refugee Convention's definition of a refugee¹⁸ and, therefore, its discussion falls outside the purview of this article), but adds in article 1(1) that a person will also qualify to be a refugee if:

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, [he] is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

This definition has been described by Moore as 'the expanded 1969 OAU Convention refugee definition'.¹⁹ Jackson has called it 'the extended refugee definition', but he has cautioned that 'there must ... necessarily be a considerable amount of overlapping, and as regards their practical application, the difference between the two definitions is probably not as great as at first sight appears'.²⁰ It has been rightly observed that the OAU Refugee Convention's definition's 'inclusion ... of those fleeing the country due to "events seriously disturbing public order" enabled individuals caught up in the fight against colonial domination to be afforded protection'.²¹ Jackson argues that the practical application of the 1951 UN Refugee Convention in group situations 'no doubt covered very many of the persons falling within the scope of the "extended" definition in paragraph 2 of article I of the OAU Convention'.²²

It is submitted that, by adopting the OAU Refugee Convention's definition, African countries wanted to ensure that the recognition of the unique characteristics of African refugees got binding legal status under

¹⁶ n 13 above, para 6.

¹⁷ Oyelade (n 4 above) 152–182; Viljoen (n 1 above) 253–260.

¹⁸ Eg, see M Smith 'The relevancy of the work of the International Criminal Court to refugee status determination' (2008) 20 *International Journal of Refugee Law* 167–169; HE Cameron 'Risk theory and "subjective fear": The role of risk perception, assessment, and management in refugee status determinations' (2008) 20 *International Journal of Refugee Law* 567 573; A Atkinson 'Assumption of risk in United States refugee law' (2008) 49 *Virginia Journal of International Law* 273 277 284.

¹⁹ J Moore 'The alchemy of exile: Strengthening a culture of human rights in the Burundian refugee camps in Tanzania' (2008) 27 *Washington University Journal of Law and Policy* 139 141.

²⁰ Jackson (n 2 above) 178.

²¹ Murray (n 3 above) 57.

²² Jackson (n 2 above) 178.

the OAU treaty and not under General Assembly Resolutions whose legal effect has for many years been a source of considerable disagreement among international law scholars.²³ They wanted to ensure that these problems are recognised through the 'main door' rather than the 'back door' in the law of treaties. The OAU Refugee Convention's definition of a refugee has been incorporated in refugee legislation in various African countries, such as Angola, Benin, Burkina Faso, Burundi, Central African Republic, Gabon, Congo Brazzaville, Ghana, Lesotho, Liberia, Malawi, Mozambique, Nigeria, Rwanda, Senegal, Somalia, South Africa,²⁴ Sudan, Tanzania,²⁵ Uganda²⁶ and Zimbabwe.²⁷ The fact that many African countries have incorporated the OAU Refugee Convention's definition of a refugee could be indicative of the commitment of these countries to give effect to that treaty and also to ensure that they extend as much protection to people fleeing their countries as possible. The article now examines the role the African Commission has played in promoting and protecting refugees' rights in Africa and, in the process, an analysis of the relevant refugee principles as laid down in the OAU Refugee Convention and the 1951 UN Refugee Convention, read together with the 1967 Protocol, will be undertaken.

²³ It has been observed that '... the legal effect of UN General Assembly Resolutions has been the subject of constant debate among scholars. Most legal writers are of the view that such resolutions may be evidentiary weight of customary international law ... The traditional view is that the Resolutions of the General Assembly are not binding, as they are only recommendations.' See LB Malagar & MA Madgoza-Malagar 'International law of outer space and the protection of intellectual property rights' (1999) 17 *Boston University International Law Journal* 311 340. The International Court of Justice 'note[d] that General Assembly Resolutions, even if they are not binding, may sometimes have normative value'. See ICJ Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 ICJ 32-33 para 70, as cited in PM Rao 'Multiple international judicial forums: A reflection on the growing strength of international law or its fragmentation?' (2004) 25 *Michigan Journal of International Law* 929 942. It has been argued that the 'General Assembly Resolutions ... while technically only recommendations, have been viewed by several member countries, with regard to certain matters and within certain limits, as legally binding'. See GR Lande 'The effect of the Resolutions of the United Nations General Assembly' (1966) 19 *World Politics* 85. While referring to the United States courts and how they have treated UN General Assembly Resolutions, it was observed that 'traditionally, United States courts have not considered United Nations General Assembly Resolutions to be authoritative sources of international law, unless the Resolution merely restated legal principles that could be verified by reference to recognized sources such as customary international law, treaties, and judicial decisions. Recently, however, some courts have gone further and have given General Assembly Resolutions the same weight as fully-fledged sources of international law. Other courts have refused to take this step and have preferred to treat Resolutions as mere evidence of international law.' See GJ Kerwin 'The role of the United Nations General Assembly Resolutions in determining principles of international law in United States Courts' (1983) 4 *Duke Law Journal* 876.

²⁴ Sec 3 South Africa Refugee Act (1998).

²⁵ Sec 4 Tanzania Refugee Act (1998).

²⁶ Sec 4 Uganda Refugee Act (2006).

²⁷ Jackson (n 2 above) 194-209.

3 The African Commission on Human and Peoples' Rights and refugee rights in Africa

The African Commission was established under article 30 of the African Charter. Article 45 of the Charter gives the African Commission the mandate to promote and protect the rights and freedoms of the people on the African continent enshrined in the African Charter. The African Commission is empowered to interpret human rights treaties in the African human rights system that have been ratified by African countries and it is upon that basis that it interprets the OAU Refugee Convention. This is so notwithstanding the fact that the OAU Refugee Convention was adopted several years before the African Charter was adopted.

3.1 Some measures taken by the African Commission to protect and promote refugee rights

3.1.1 The Special Rapporteur on Prisons

Although the African Charter does not contain a provision which explicitly empowers the African Commission to establish special mechanisms, the African Commission 'had to adopt a progressive interpretation to find room for these mechanisms within its Charter mandate'.²⁸ Since 1994, the African Commission has 'established a number of Special Rapporteurs to provide focal points for the Commission on issues arising from the Charter'.²⁹ It is against that background that, in enforcing the rights of refugees in Africa, the African Commission, while appointing the Special Rapporteur on Prisons and Conditions of Detention in Africa, gave him a wide mandate for his first two years, which included making available an evaluation of the conditions of detention in Africa, highlighting the main problems. This evaluation had to include areas such as conditions of detention of particularly vulnerable groups such as refugees.³⁰ However, it is not clear from the reports of the African Commission whether the Special Rapporteur on Prisons in Africa ever visited any place of detention in which the refugees were detained during his first two years. It is also not mentioned in the most recent and only extensive analysis of the work of the office of the Special Rapporteur on Prisons in Africa whether he ever visited any place of detention where refugees were being detained.³¹ This could be attributed to the

²⁸ Viljoen (n 1 above) 392.

²⁹ As above.

³⁰ 10th Annual Activity Report of the African Commission, Annex VII.

³¹ See F Viljoen 'The Special Rapporteur on Prisons and Conditions of Detention in Africa: Achievements and possibilities' (2005) 27 *Human Rights Quarterly* 125-171.

fact that his mandate is very wide and he has limited financial and human resources to carry out visits, even in prisons where there are no refugees.³²

3.1.2 The Special Rapporteur on Refugees

The fact that the Special Rapporteur on Prisons and Conditions of Detention in Africa did not pay serious attention to the plight of refugees in Africa could explain why the African Commission, after concluding that the Special Rapporteur mechanism ‘was not very successful’ and therefore needed an overhaul, at its 34th ordinary session appointed Commissioner Bahame Tom Mukirya Nyanduga to act as the Focal Person on Refugees and Displaced Persons in Africa.³³ This office was later upgraded to the status of Special Rapporteur on Refugees, Asylum Seekers and Displaced Persons in Africa. The Special Rapporteur on Refugees has carried out various activities to promote and protect the rights of refugees and displaced persons. In his inter-session report at the 44th ordinary session of the African Commission in November 2008, the Special Rapporteur reported that he had issued a statement condemning the xenophobic attacks in South Africa and suggesting various measures that should be adopted by the government of South Africa to protect migrant workers.³⁴ He gave a radio interview in which he ‘condemned the [xenophobic] attacks, called for their cessation, and urged the authorities at all levels to ensure that timely action is taken to deal with the problem’³⁵ and participated in a meeting of African Union (AU) Member States’ Legal Experts to ‘finalise the draft AU Convention on the Protection and Assistance to IDPs’.³⁶

The Special Rapporteur is reported to have published various papers in peer-reviewed journals about refugees in Africa and also to have discussed plans for these displaced persons in Geneva, together with

³² JD Mujuzi ‘An analysis of the approach to the right to freedom from torture adopted by the African Commission on Human and Peoples’ Rights’ (2006) 6 *African Human Rights Law Journal* 435-437.

³³ 17th Annual Activity Report of the African Commission 2003-2004, para 32.

³⁴ *Report of Activities by the Special Rapporteur on Refugees, Asylum Seekers, IDPs and Migrants in Africa for the Intersession Period May to November 2008* (November 2008, paras 1 & 2 <http://www.achpr.org/english/Commissioner%27s%20Activity/44th%20OS/Special%20Rapporteurs/IDPs.pdf> (accessed 3 February 2009). The African Commission also issued a resolution condemning the xenophobic attacks in South Africa; see Resolution on the Situation on Migrants in South Africa, ACHPR/Res 131 (XXXXIII)08 of May 2008 http://www.achpr.org/english/resolutions/resolution131_en.htm (accessed 9 February 2009).

³⁵ *Report of Activities* (n 34 above) para 3.

³⁶ *Report of Activities* (n 34 above) para 4.

the Bureau of the UN Secretary-General's Special Representative for the Rights of Displaced Persons and with the Brookings Institution, University of Berne.³⁷ He delivered a lecture on 'the role of the Special Rapporteur on Refugees, Asylum Seekers, IDPs and Migrants in Africa' to the LLM students at the Centre for Human Rights, University of Pretoria.³⁸ The Special Rapporteur, at the invitation of the AU, participated in the Humanitarian and Security Assessment Mission to Darfur, Sudan (from 2 to 4 June 2005) to make an assessment of the humanitarian and security situation in Darfur following the deployment of the AU Military Observer Force.³⁹

He has attended conferences or expert meetings on refugees' rights in countries such as Burkina Faso (June 2006),⁴⁰ Austria (September 2006),⁴¹ Switzerland (September 2007),⁴² Rwanda (October 2007),⁴³ Uganda (March 2008),⁴⁴ South Africa (March 2008)⁴⁵ and Tanzania (April 2008).⁴⁶ He has delivered papers at seminars or conferences on the rights of refugees and IDPs in countries such as Uganda (July 2008),⁴⁷ Norway (July 2008),⁴⁸ Ethiopia (October 2006)⁴⁹ and Tanzania (April 2008).⁵⁰ The African Commission has also put seminars and conferences on refugees and IDPs on the list of the seminars it would like to host from time to time.⁵¹ The Special Rapporteur has closely monitored the situation of refugees' rights in politically unstable countries and has condemned refugee rights violations in

³⁷ 18th Annual Report of the African Commission 2004-2005 paras 28-32. The Special Rapporteur is reported to have given 'an interview on the situation of refugees and displaced people in Africa, and other related human rights issues, which appears in a book titled *Africa's long road to rights – Reflections on the 20th anniversary of the African Commission on Human and Peoples' Rights*'. See 23rd Activity Report of the African Commission on Human and Peoples' Rights, May 2007–November 2007, EX CL/446(XIII) Annex I, para 75 (footnotes omitted).

³⁸ 24th Activity Report of the African Commission on Human and Peoples' Rights, November 2007–May 2008, EX CL/446(XIII) Annex II, para 154.

³⁹ 19th Activity Report of the African Commission, July–December 2005 para 37.

⁴⁰ 21st Activity Report of the African Commission, May–November 2006, EX CL/322(X), para 44.

⁴¹ As above.

⁴² 23rd Activity Report of the African Commission para 80.

⁴³ 23rd Activity Report of the African Commission para 83.

⁴⁴ 24th Activity Report of the African Commission para 151.

⁴⁵ n 44 above, para 152.

⁴⁶ n 44 above, para 153.

⁴⁷ *Report of Activities* (n 34 above) para 5.

⁴⁸ *Report of Activities* (n 34 above) para 7.

⁴⁹ n 40 above.

⁵⁰ n 44 above, paras 155 & 156.

⁵¹ n 40 above, para 73; 22nd Activity Report of the African Commission para 97.

those countries.⁵² For example, on the situation of human rights in Eastern Democratic Republic of Congo, he categorically condemned ‘the disregard and wanton violation of the human rights of the civilian population’ by all the warring parties and ‘condemn[ed] the deliberate attack and emptying of a camp hosting 50 000 refugees and IDPs in eastern DRC’.⁵³ Regarding the situation in Somalia, he was concerned at the ‘serious deterioration in the human rights and international humanitarian law situation with massive violations’ such as ‘[t]he internal displacement of an estimated 1 million people from Mogadishu ... and the flight of about 50 000 people into Kenya’.⁵⁴ On the situation in Mauritania, the Special Rapporteur recalled that ‘in November 2007, the democratically elected government of ... Mauritania committed itself to the return of Mauritania[n] refugees from Senegal and Mali’, but that ‘unfortunately’ the coup in Mauritania had ‘set back the process’. It is because of that background that he ‘call[ed] for a quick return to constitutionality so that the refugees, who had been suffering for long and who are now returning to Mauritania, recover their rights in accordance with the decision of the Commission’.⁵⁵ On the situation in Sudan, he sent a letter to the government appealing to it ‘to co-operate with the African Union and the UN, in finding an amicable solution to the deployment of the UN peacekeeping force in the Darfur’.⁵⁶ It can be observed from the above that the Special Rapporteur on Refugees has been carrying out his mandate. As indicated earlier, the African Commission extended the mandate of the Special Rapporteur on Refugees to also include migration issues.⁵⁷ Using his extended mandate, the Special Rapporteur has carried out various activities, including presenting papers and working hand in hand with international organisations, such as

⁵² Eg, it is reported that ‘Commissioner Bahame Nyanduga reported on the situation of refugees, asylum seekers and IDPs and Migrants in Africa, in particular in countries affected by conflicts, namely: the DRC, Darfur-Sudan, Central African Republic, Chad, Somalia, Northern Uganda and Côte d’Ivoire. He observed that the conflict in these countries impacts negatively on the human rights of these people, in particular women and children.’ See 23rd Activity Report of the African Commission para 76. See also 24th Activity Report of the African Commission paras 167–171. He has also monitored the human rights situation in Burundi and the plight of Liberian refugees in Ghana and that of Saharawi refugees in Algeria. See 24th Activity Report of the African Commission paras 164–166.

⁵³ *Report of Activities* (n 34 above) para 9.

⁵⁴ *Report of Activities* (n 34 above) paras 4–5.

⁵⁵ *Report of Activities* (n 34 above) 5. The Special Rapporteur had earlier ‘... commended the Islamic Republic of Mauritania for starting to implement the repatriation programme of Mauritanian refugees from Senegal, whose rights have been denied for the past 20 years. He called on the government to also implement the recommendations made by the ACHPR following the fact-finding mission undertaken in September 2007.’ See 24th Activity Report of the African Commission para 163.

⁵⁶ n 40 above, para 45.

⁵⁷ 20th Activity Report of the African Commission para 6.

the International Committee of the Red Cross, to promote humanitarian law on the African continent.⁵⁸

3.1.3 Reports about country visits, fact-finding missions and country periodic reports

The African Commission has carried out several fact-finding missions and promotional missions in which the rights of refugees have been brought to the attention of government officials in the countries visited. The African Commission is empowered under article 62 of the African Charter to receive and examine reports on the measures taken by African countries to implement their obligations under the African Charter. What follows is a discussion of how refugees' rights have been promoted and protected under the aforementioned three mechanisms.

In its Report on the Mission of Good Offices to Senegal, during which it reported on its visit to Senegal, after being notified by a Senegalese non-governmental organisation (NGO) about the grave human rights violations that were taking place in that country which resulted in massive displacement of people, the African Commission, after studying the root cause of the violations and suggesting a number of strategies that could be put in place by the government of Senegal, recommended to the government that it should ensure that the refugees who had fled are encouraged to return to their homes by guaranteeing them security.⁵⁹ In its report on the mission to Mauritania, where it investigated 'disturbing violations of human rights', the African Commission investigated and documented various problems that were facing Mauritanian refugees in Senegal and recommended numerous measures that should be put in place to solve their problems.⁶⁰ The African Commission has also carried out promotional missions to several African countries and during those missions it has raised the issue of refugees' rights with government officials or members of civil society in countries such as Burkina Faso,⁶¹ Swaziland,⁶² Burundi,⁶³ Rwanda,⁶⁴ Botswana,⁶⁵ Lesotho⁶⁶ and Seychelles.⁶⁷

⁵⁸ n 57 above, paras 44–45.

⁵⁹ 10th Annual Activity Report of the African Commission 1996–1997 Annex VIII para VI(1).

⁶⁰ n 59 above, Annex IV.

⁶¹ *Report of a Promotion Mission of Commissioner Rezag Bara to Burkina Faso* (26–30 March 2007) para 28.

⁶² *Report of the Promotional Mission to the Kingdom of Swaziland* (21–25 August 2006) paras 42 & 43.

⁶³ *Report of the Mission of Promotion to Burundi by Commissioner Mohamed Abdellahi Ould Babana* (4–11 February 2004) paras 30, 51, 52 & 59–63.

⁶⁴ *Report of Promotional Mission Undertaken by Commissioner Mohamed Abdellahi Ould Babana in Rwanda* (26 January–2 February 2004) paras 51, 81, 90, 91, 93, 94 & 135.

⁶⁵ *Mission Report to the Republic of Botswana* (14–18 February 2005) 13, 15, 20, 21 & 45.

⁶⁶ *Report of the Promotional Mission to the Kingdom of Lesotho* (3–7 April 2006) para 37.

⁶⁷ *Report of the Promotional Mission to the Republic of Seychelles* (26–30 July 2004) 7, 8 & 14.

In its report on a fact-finding mission to the Sudan, the African Commission highlighted the plight of refugees and internally-displaced persons in the Sudan and neighbouring Chad,⁶⁸ although for logistical reasons the delegation was unable to visit 'Sudanese refugee camps situated in Chad'⁶⁹ and called upon the government of Sudan to, amongst other things, ensure that the 'repatriation policy [...] conform to the voluntary wishes of the displaced persons and refugees, upon the establishment of security and other favourable conditions' and that '[c]onsultations with humanitarian agencies on the ground will facilitate the restoration and promotion of the IDPs' confidence, which is ... lacking in government'.⁷⁰ From 29 August to 3 September 2005, the Special Rapporteur on Refugees undertook a fact-finding mission to Senegal to investigate the situation of Mauritanian refugees in Senegal. The purpose of the visit was to facilitate 'a durable solution to the Mauritanian refugee problem'.⁷¹ The Special Rapporteur has also carried out a fact-finding mission to Botswana 'on the protection regime for asylum seekers, refugees and migrants in Botswana'.⁷² He also undertook a fact-finding mission to Mali and Mauritania 'regarding the question of Mauritanian refugees in Mali' and commended the government of Mauritania for, amongst other things, introducing a democratic process in the country 'which had enabled the government to adopt a new policy of bringing all Mauritanian refugees back to Mauritania'.⁷³ The Special Rapporteur 'affirmed' to the African Commission that 'he continue[d] to follow the situation affecting an alleged 3 million Zimbabwean asylum seekers in the sub-region, hoping that a fact-finding mission to a number of states in the sub-region will be authorised as requested by the Commission'.⁷⁴

As mentioned earlier, article 62 of the African Charter requires state parties to submit initial and periodic reports on the measures they have taken to promote and protect the rights guaranteed under the

⁶⁸ *The African Commission's Report of the Fact-Finding Mission to the Republic of Sudan* undertaken from 8–18 July 2004, 22nd Activity Report of the African Commission paras 5, 27, 35 & 114.

⁶⁹ n 57 above, para 14.

⁷⁰ n 57 above, para 133. At para 150, the Commission recommends that '[t]he implementation of the government policy of repatriation should be strictly voluntary, on condition that the security and social infrastructure is repaired and the burnt out villages are rebuilt. To the end ... government [should] fully co-operate with international humanitarian agencies and other relevant partners with a view to ensuring that ... displaced persons and the refugees return voluntarily to their villages of origin.'

⁷¹ n 39 above, para 42.

⁷² *Report of Activities* (n 34 above) para 6.

⁷³ n 42 above, para 77.

⁷⁴ n 44 above, para 174.

African Charter. States such as Senegal,⁷⁵ Algeria,⁷⁶ Democratic Republic of Congo,⁷⁷ Ethiopia,⁷⁸ Tunisia,⁷⁹ Sudan,⁸⁰ Tanzania,⁸¹ Uganda,⁸² Madagascar⁸³ and Nigeria⁸⁴ have reported on the measures they have taken. However, because of the fact that the African Commission is yet to publish concluding observations and recommendations on state parties' initial and periodic reports,⁸⁵ it is difficult to assess whether the African Commission, after examining a state party's report, has ever recommended to any state party to put in place measures to protect refugees' rights.

3.1.4 Resolutions and memorandum

The African Commission has also passed various resolutions calling upon various parties to the conflicts in Africa and also various countries to respect the rights of refugees. These include resolutions on the former Zaire, calling upon parties to the then conflict to respect the human rights of refugees in the country,⁸⁶ and on Sudan.⁸⁷ As mentioned earlier, the African Commission issued a resolution in which it strongly condemned the xenophobic attacks which took place in South Africa in mid-2008.⁸⁸ The African Commission also signed a Memorandum of Understanding with the UNHCR with the

⁷⁵ 3rd, 4th, 5th, 6th and 7th Periodic Reports of Senegal in Application of Article 62 of the African Charter on Human and Peoples' Rights (reported not dated) 22.

⁷⁶ 3rd and 4th Periodic Reports of the Peoples' Democratic Republic of Algeria to the African Commission on Human and Peoples' Rights (2006) 18.

⁷⁷ 8th, 9th and 10th Periodic Reports of the Democratic Republic of Congo to the African Commission on Human and Peoples' Rights (2007) paras 141 & 144.

⁷⁸ Combined Report (Initial and Four Periodic Reports) of the Federal Democratic Republic of Ethiopia to the African Commission on Human and Peoples' Rights (2008) paras 99–301, 425 & 427.

⁷⁹ Consolidated 4th, 5th, 6th, 7th, 8th & 9th Periodic Reports of Tunisia under the Terms of Article 62 of the African Charter on Human and Peoples' Rights (1995–2006) paras 56, 225 & 229.

⁸⁰ 3rd Periodical Report of the Republic of the Sudan under Article 62 of the African Charter on Human and Peoples' Rights (2006) paras 222, 224–226, 229–237, 296, 302, 408 & 416.

⁸¹ The 2nd to 10th Consolidated Periodic Report Submitted by the United Republic of Tanzania under the African Charter on Human and Peoples' Rights (2006) 21–22.

⁸² Report by the Government of Uganda to the African Commission on Human and Peoples' Rights (2008) 45.

⁸³ Periodic Report of Madagascar in Accordance with the African Charter on Human and Peoples' Rights (2008) 376–380 & 592.

⁸⁴ Nigeria's 3rd Periodic Country Report (2005–2008) on the Implementation of the African Charter on Human and Peoples' Rights in Nigeria (2008) 16, 19, 73, 74 & 76–78.

⁸⁵ At the time of writing, there were no concluding observations or recommendations posted on the African Commission's website. See http://www.achpr.org/english/_info/concluding%20observation_sessions.html (accessed 9 February 2009).

⁸⁶ n 30 above, Annex XI.

⁸⁷ n 33 above, Annex IV.

⁸⁸ See Resolution on the Situation on Migrants in South Africa (n 34 above).

objective of protecting the rights of refugees in Africa⁸⁹ and adopted the Modalities for the Operationalisation of the Memorandum of Understanding between the African Commission and the UN Commissioner on Refugees,⁹⁰ which is the implementing document of the Memorandum which requires, among other things, that both institutions appoint a focal person.

The above are some of the general activities that the African Commission has carried out to protect and promote the rights of refugees in Africa. We now go to the jurisprudence of the African Commission to establish the extent to which the rights of refugees have been dealt with.

3.1.5 The jurisprudence of the African Commission and refugees' rights in Africa

Articles 55 and 56 of the African Charter empower the African Commission to receive individual communications alleging violations of any of the rights under the African Charter. The African Commission has over time, especially through individual communications,⁹¹ developed a rich jurisprudence in relation to several rights under the African Charter.⁹² What follows is a discussion of the communications in which the African Commission has dealt with the rights of refugees.

In *Organisation Mondiale Contre La Torture and Others v Rwanda*, it was alleged that Rwanda had expelled Burundian refugees who had been in Rwanda for many years without giving them a chance to be heard. The African Commission observed that:⁹³

Article 12 of the African Charter reads:

- (3) Every individual shall have the right, when persecuted to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions. (4) A non-national legally admitted in a territory of a state party to the present Charter, may

⁸⁹ 16th Annual Activity Report of the African Commission Annex IV art I. For the history and details of this memorandum, see Murray (n 3 above) 61–62.

⁹⁰ n 89 above.

⁹¹ Under arts 47–54, the African Commission has the mandate to entertain inter-state communications. However, at the time of writing, the African Commission had only dealt with one inter-state communication, *Democratic Republic of Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2004). For a detailed discussion of this communication, see JD Mujuzi 'Inter-state communications under the African Charter on Human and Peoples' Rights: Confirming the dwindling divide between international humanitarian law and human rights law? An appraisal of *Democratic Republic of Congo v Burundi, Rwanda and Uganda* (Communication 227/99) (2007) 2 *African Yearbook on International Humanitarian Law* 139–158.

⁹² For a detailed discussion of the jurisprudence developed by the African Commission, see Viljoen (n 1 above) 310–417. See also F Viljoen 'Introduction to the African Commission and the regional human rights system' in C Heyns (ed) *Human rights law in Africa* (2004) 385–505.

⁹³ (2000) AHRLR 282 (ACHPR 1996) paras 29–34.

only be expelled from it by virtue of a decision taken in accordance with the law.

This provision should be read as including a general protection of all those who are subject to persecution, that they may seek refuge in another state. Article 12(4) prohibits the arbitrary expulsion of such persons from the country of asylum. The Burundian refugees in this situation were expelled in violation of articles 2 and 12 of the African Charter.

Article 12(5) of the African Charter reads: 'The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.'

There is ample evidence in this communication that groups of Burundian refugees have been expelled on the basis of their nationality. This constitutes a clear violation of article 12(5).

Article 7(1) of the Charter reads:

Every individual shall have the right to have his case heard. This comprises (a) the right to an appeal to competent national organs against acts violating his fundamental rights ...

By expelling these refugees from Rwanda, without giving them the opportunity to be heard by the national judicial authorities, the government of Rwanda has violated article 7(1) of the Charter.

It is not clear in the communication why the African Commission had to rely exclusively on the African Charter to find that Rwanda had violated the rights of the Burundian refugees, yet the 1969 OAU Refugee Convention was already in force (it entered into force on 20 June 1974) and Rwanda had ratified it as early as 19 November 1979 and this communication was filed 10 years later (1989). This could be attributed to the fact that the NGOs that filed the communication did not allege violations under the 1969 OAU Refugee Convention but rather of the African Charter. But even then, the African Commission is empowered under article 60⁹⁴ of the African Charter to draw inspiration from other African and international human rights treaties where necessary. In the same vein, the African Commission should have referred to the 1951 UN Refugee Convention and the Protocol because Rwanda had ratified both instruments in January 1980.

However, the African Commission should be given credit for having interpreted the African Charter in a manner that was protective of the rights and freedoms of refugees and hence for coming to the conclusion that it would have more or less come to had it referred to the relevant refugee conventions. The above ruling indicates that the

⁹⁴ Art 60 of the African Charter provides that '[t]he Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the parties to the present Charter are members'.

fundamental principle of refugee law, that is *non-refoulement*,⁹⁵ which ‘... the international community has generally accepted ... as a binding rule’⁹⁶ and which is ‘[a]rguably, the most practical protection granted to refugees’⁹⁷ in refugee law, can be implied in article 12 of the African Charter. This interpretation has far-reaching consequences for African countries such as Djibouti, Eritrea, Madagascar, Mauritius, Namibia, Saharawi Republic, Somalia and São Tomé and Príncipe that have not yet ratified the 1969 OAU Refugee Convention, but have ratified the African Charter. It means that such countries cannot just expel refugees without putting into consideration their rights, such as the right not to be sent back to a country where they will be persecuted and also the right to be heard before they can be returned back to such countries. The right to be heard in refugee matters before a refugee is expelled is one of the ways to ensure that the refugees are not returned to their countries of origin where they will be in danger. It gives them an opportunity to present their case and bring important facts before the judicial or quasi-judicial body that is empowered to make the decision whether they should be returned to their countries of origin or not.

In another communication that dealt specifically with the rights of refugees, *Mouvement des Réfugiés Mauritaniens au Sénégal v Sénégal*,⁹⁸

⁹⁵ For a detailed discussion of the principle of *non-refoulement*, see E Lauterpacht & D Bethlehem ‘The scope and content of the principle of *non-refoulement*: Opinion’ in E Feller et al (eds) *Refugee protection in international law: UNHCR’s global consultations on international protection* (2003) 87–181; A Duffy ‘Expulsion to face torture? *Non-Refoulement* in international law’ (2008) 20 *International Journal of Refugee Law* 373–390. It has been observed that ‘[t]he fundamental principle of legal protection is expressed in article 33 of the 1951 Convention — *non-refoulement*; the prohibition of a state from sending persons back to states where they may face persecution’. See KW Yundt ‘The Organisation of American States and legal protection of political refugees in Central America’ (1989) 23 *International Migration Review* 202. It has also been observed that ‘UNHCR Executive Committee conclusions underline the fundamental importance of observing the principle of *non-refoulement* “of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognised as refugees”...’ See F Nicholson ‘Implementation of the Immigration (Carrier’s Liability) Act 1987: Privatising immigration functions at the expense of international obligations?’ (1997) 46 *International and Comparative Law Quarterly* 612.

⁹⁶ See RK Goldman & MM Scott ‘International legal standards relating to the rights of aliens and refugees in the United States immigration law’ (1983) 5 *Human Rights Quarterly* 312. It has been argued that ‘... customary international law ... recognises the principle of *non-refoulement* and binds all countries, regardless of ratification status [of the 1951 UN Refugee Convention], to this principle’. See LC Currie ‘The vanishing Hmong: Forced repatriation to an uncertain future’ (2008) 34 *North Carolina Journal of International Law and Commercial Regulation* 340.

⁹⁷ CJ Benson ‘Crossing borders: A focus on treatment of transgender individuals in US asylum law and society’ (2008) 30 *Whittier Law Review* 44. It has been argued that ‘... the principle of *non-refoulement* is a universally accepted and binding international law norm’. See J Ramji-Nogales ‘A global approach to secret evidence: How human rights law can reform our migration system’ (2008) 39 *Columbia Human Rights Law Review* 332.

⁹⁸ (2000) AHRLR 287 (ACHPR 1997).

it was alleged before the African Commission, among other things, that⁹⁹

a group of individuals described as Mauritanian refugees were arrested by the Senegalese *gendarmerie* in Mboumba and on the Island of Morphil in October 1996 [and] ... that these Mauritanian refugees are still being held at the Central Prison in Saint Louis, whilst Senegalese nationals arrested together with them have been set free.

The complainant also alleged that many Mauritanian refugees had been expelled from Senegal to Mauritania where they were at risk of being persecuted. The African Commission held that the communication was inadmissible because of two reasons: first, that the complainant had not exhausted domestic remedies and, secondly, that the complainant did not mention the provision of the African Charter that the Senegalese government had violated. It is submitted that under article 56 of the African Charter, it is not a requirement that, for a communication to be admitted, it must mention the provision of the African Charter that is alleged to have been violated. The African Commission should have inferred from the facts of the communication which provisions of the African Charter had been violated. This is because very few people understand the procedural technicalities that have to be complied with before a communication is brought to the African Commission and the African Commission should always give them the benefit of the doubt by adopting a generous and purposive interpretation. The African Commission should have investigated whether Senegal's conduct did not violate article 12 or any other relevant provision of the African Charter.

As in *Organisation Mondiale Contre La Torture and Others v Rwanda*,¹⁰⁰ where the complainant did not mention that Rwanda had violated the 1969 OAU Refugee Convention, also in this communication the complainant did not mention that Senegal had violated the 1969 OAU Refugee Convention although Senegal had ratified this treaty as early as April 1971. The African Commission should have relied on article 60 of the African Charter to investigate whether Senegal had not violated the 1969 OAU Refugee Convention. It is argued that the African Commission should be more pro-active when it comes to protecting the rights and freedoms of very vulnerable people such as refugees. This is because some, if not most, of these people can hardly mobilise resources and engage lawyers to exhaust domestic remedies in a host country that is alleged to violate their rights. The standard that the African Commission uses to protect people who are victims of massive human rights violations, that is that they are not required to exhaust domestic remedies, could also be extended to refugees when they allege that a host country is violating their rights. In cases of individual

⁹⁹ n 98 above, paras 2 & 3.

¹⁰⁰ (2000) AHRLR 282 (ACHPR 1996).

refugees who allege that their countries violated their rights but cannot go back to their countries to exhaust domestic remedies, the African Commission has declared such communications admissible 'based on the principle of constructive exhaustion of local remedies'.¹⁰¹

Another communication in which the African Commission dealt with the question of the rights of refugees is *African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v. Guinea*.¹⁰² This communication raised several interesting issues and warrants a detailed discussion. The complainant alleged that on 9 September 2000, Guinean President Lansana Conté proclaimed over the national radio that Sierra Leonean refugees in Guinea should be arrested, searched and confined to refugee camps and that his speech incited soldiers and civilians alike to engage in mass discrimination against Sierra Leonean refugees in violation of article 2 of the African Charter. The complainant alleged further that, as a result of the speech, widespread looting and extortion occurred; that the Guinean soldiers evicted Sierra Leoneans from their homes and refugee camps; that the soldiers further looted the homes of refugees, confiscated food, personal property and money from refugees at checkpoints; that they also extorted large sums of money from detained refugees and that these items were never returned to them. The complainant alleged further that the speech incited soldiers and civilians to rise up against Sierra Leonean refugees inside and outside of the refugee camps. The resulting physical violence ranged from beatings and rapes to shooting and killing. 'Countless refugees died in these attacks, and many have scars as permanent reminders of their time in Guinea.'¹⁰³

Paradoxically, in this communication the complainant did not allege that the government of Guinea had violated its obligations under the 1969 OAU Refugee Convention or the 1951 UN Refugee Convention. However, the African Commission used its mandate under article 60, read together with article 12(5), of the African Charter to find violations under the above refugee treaties. The African Commission observed in respect of the mass expulsion of people because of their nationality that this conduct is not only prohibited by the African Charter, but also¹⁰⁴

[a]mong the articles and other legal instruments to which the respondent state is a party and by which it is bound to protect all persons against discrimination can be noted: article 4 of the OAU Convention on the Specific Aspects of Refugees, article 26 of the International Covenant on Civil and Political Rights and article 3 of the 1951 United Nations Convention on the Status of Refugees.

¹⁰¹ *Ouko v Kenya* (2000) AHRLR 135 (ACHPR 2000) para 19.

¹⁰² (2004) AHRLR 57 (ACHPR 2004).

¹⁰³ 20th Activity Report of the African Commission on Human and Peoples Rights, Annex IV, 132, para.4.

¹⁰⁴ n 102 above, para 45.

The complainant also alleged that Guinea 'violated the principle of *non-refoulement* under which no person should be returned by force to his home country where his liberty and life would be under threat'.¹⁰⁵ They contended further, in the light of the principle of *non-refoulement*, that the President's speech¹⁰⁶

not only made thousands of Sierra-Leonean refugees flee Guinea and return to the dangers posed by the civil war, but it also clearly authorised the return by force of Sierra-Leonean refugees. Thus, the voluntary return of refugees to Sierra Leone under these circumstances cannot be considered as voluntary but rather as a dangerous option available for the refugees.

The government of Guinea responded by arguing that the Sierra Leonean refugees had been involved in rebel activities against Guinea¹⁰⁷ and that it had to put in place measures to ensure that the lives of the people in Guinea and the territorial integrity of Guinea were protected. It was urged that it was in light of this that the President 'recommended that all refugees be quartered and that Guineans scatter in all districts in order to unmask the attackers who had infiltrated the population'.¹⁰⁸ The Guinean government further argued that¹⁰⁹

[s]uch measures are in conformity with the provisions of article 9 of the 1951 UN Convention on the Status of Refugees ... and article 41 of the Laws of Guinea which provides that 'the President ... is the guarantor/custodian of the independence of the nation and of the territorial integrity. He is responsible for national defence.'

In responding to the defence of Guinea, the African Commission observed that it is aware¹¹⁰

that African countries generally and the Republic of Guinea in particular, face a lot of challenges when it comes to hosting refugees from neighbouring war-torn countries. In such circumstances some of these countries often resort to extreme measures to protect their citizens. However, such measures should not be taken to the detriment of the enjoyment of human rights.

The African Commission should be credited for having realised that African states face daunting challenges when it comes to hosting refugees, but that in trying to deal with those challenges, they should not compromise their regional and international human rights obligations. However, it is regrettable that the African Commission did not give its opinion on whether Guinea's acts were consistent with article 9 of the 1951 UN Refugee Convention as Guinea had pleaded. Article 9 states that:

¹⁰⁵ n 102 above, para 58.

¹⁰⁶ n 102 above, para 48.

¹⁰⁷ n 102 above, paras 49 & 50.

¹⁰⁸ n 102 above, para 51.

¹⁰⁹ n 102 above, para 52.

¹¹⁰ n 102 above, para 57.

Nothing in this Convention shall prevent a contracting state, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the contracting state that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.

The African Commission should have held that article 9 of the 1951 UN Refugee Convention was not applicable as a defence for the government of Guinea because that article deals with measures that are taken before a person has been granted refugee status in the host country. An examination of the submissions of both the government of Guinea and of the complainant shows that the issue was not whether the measures taken were violating the rights of the people who had not yet been granted refugee status, but rather whether the measures taken violated the rights of people who had already been granted refugee status. The 1969 OAU Refugee Convention does not have a provision similar to article 9 of the 1951 UN Refugee Convention. The African Commission added:¹¹¹

When countries ratify or sign international instruments, they do so willingly and in total cognisance of their obligation to apply the provisions of these instruments. Consequently, the Republic of Guinea has assumed the obligation of protecting human rights, notably the rights of all those refugees who seek protection in Guinea.

The African Commission noted that ‘those who drafted the [African] Charter considered large-scale expulsion as a special threat to human rights’¹¹² and that it ‘appreciates the legitimate concern of the Guinean government in view of the threats to its national security posed by the attacks from Sierra Leone and Liberia with a flow of rebels and arms across the borders’;¹¹³ and that ‘as such the government of Guinea is entitled to prosecute persons that they believe pose a security threat to the state’. The African Commission noted that ‘however, the massive violations of human rights of refugees as ... outlined in [the] communication constitute a flagrant violation of the provisions of the African Charter’. The African Commission thus found that Guinea had violated articles 2, 4, 5, 12 (5) and 14 of the African Charter and article 4 of the 1969 OAU Refugee Convention.

Much as the complainant repeatedly raised the issue that the expulsion of the Sierra Leonean refugees was a violation of the principle of *non-refoulement*, the African Commission regrettably did not say much about that principle which is provided for under article 2(3) of the 1969 OAU Refugee Convention and article 33 of the 1951 UN Refugee Convention. This would have been an opportunity for the African Commission to clarify whether such expulsions could be justified under

¹¹¹ n 102 above, para 69.

¹¹² As above.

¹¹³ n 102 above, para 71.

article 32 of the 1951 UN Refugee Convention, which allows a host country to expel refugees when they are a threat to national security. But even then, such a state must ensure that the refugees are given a chance to be heard and must be allowed reasonable time within which to leave the country. One of the reasons why the African Commission could have failed to express its opinion strongly on the principle of *non-refoulement* but instead put emphasis on article 4 of the 1969 OAU Refugee Convention, which prohibits discrimination, is that the communication indicated that refugees from countries such as Liberia were not mistreated by the government of Guinea, but only Sierra Leonean refugees were targeted. This was considered to be discrimination on the ground of nationality, which is prohibited under article 4 of the 1969 OAU Refugee Convention and article 3 of the 1951 UN Refugee Convention.

The complainant also alleged that the government of Guinea had violated several refugees' rights, such as the right to human dignity, the right not to be subjected to sexual abuse (rape), privacy, freedom of movement, the right to property, the right to housing, the right of access to courts and the right to travel documents, most of which are protected under the 1951 UN Refugee Convention, but the African Commission regrettably did not refer to the 1951 UN Refugee Convention to establish such violations. Though, as discussed above, the African Commission referred to the African Charter to find violations of the rights to human dignity, property, life, non-discrimination and against mass expulsion, refugees would have been offered better protection if the African Commission had also referred to article 5, which recognises the fact that refugees have more rights than those under the Convention; article 7(2), which obliges state parties to accord refugees the same treatment as all aliens; articles 13 and 14, which guarantee the rights to property of the refugees; article 16, which obliges states to respect the right of refugees to access to courts; article 21, which guarantees the right to housing; article 26, which protects the right to freedom of movement; and articles 27 and 28, which protect the right to travel documents of the 1951 UN Refugee Convention. Guinea violated all these rights which it has a duty to protect. It has to be recalled that, whereas article 42 of the 1951 UN Refugee Convention allows a country at ratification to enter reservations on all the provisions of the treaty except on articles 1, 3, 4, 16(1), 33 and 36 to 46, Guinea did not enter any reservation on the provisions of the treaty that it violated¹¹⁴ and therefore it acted in breach of its obligations under the 1951 UN Refugee Convention.

¹¹⁴ See <http://www.unhchr.ch/html/menu3/b/treaty2ref.htm> (accessed 9 February 2009).

4 Conclusion

The above discussion illustrates the role the African Commission in the promotion and protection of refugee rights. It provides a brief historical background to the adoption of the 1969 OAU Refugee Convention. It is illustrated that the African Commission has put in place various measures to promote and protect refugee rights, ranging from the appointment of Special Rapporteurs to entertaining individual communications. Moreover, the discussion shows that, whereas the African Commission has entertained various communications alleging violations of refugee rights, it has leaned more towards the African Charter than the 1969 OAU Refugee Convention.

It is recommended that giving priority to the 1969 OAU Refugee Convention over the African Charter in refugee-related communications is to be preferred, as it would give refugees greater protection. The role of the African Charter as an additional measure for the protection and promotion of the rights of refugees should not be underestimated in countries that have ratified both the African Charter and the 1969 OAU Refugee Convention. However, the African Commission should be commended for having interpreted the African Charter broadly to promote and protect the rights of refugees.

African countries that have not yet ratified the 1969 OAU Refugee Convention also have obligations under the African Charter to protect and promote the rights of refugees. The African Commission is called upon to look at international law in the form of treaties when faced with communications that allege a violation of the rights of refugees. NGOs that are involved in litigation before the African Commission need to be well-acquainted with the procedure of the African Commission so that their communications are not declared inadmissible, as declaring a communication inadmissible not only frustrates such organisations, but also the refugees on whose behalf it would have been filed. These organisations should also always cite violations of the 1969 OAU Refugee Convention in their communications before the African Commission so that the Commission is given an opportunity to better develop its jurisprudence in the area of refugee law.