

ALTERNATION DENIED: AFRICA'S PRESIDENTIAL 30+ CLUB

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I. INTRODUCTION

Africa is changing rapidly and Sub-Saharan Africa in particular represents the region with the fastest growing population in the world, abounding with young people yearning for opportunities and change.¹ Yet, this region also harbors many of the longest sitting presidents in the world, each accumulating more than thirty years at the helmet.² From Angola to Zimbabwe, from Rwanda to the Congo, state leaders cling to power, often

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1. Andrews Atta-Asamoah & Jean-Michel Severino, *Head-to-head: Is Africa's Young Population a Risk or an Asset?*, BBC NEWS (Jan. 29, 2014), <http://www.bbc.com/news/world-africa-25869838>.

2. Jason Hanna, *Africa's Current Longest-Serving Leaders*, CNN, <http://www.cnn.com/2017/01/19/africa/africa-gambia-longest-serving-leaders/> (last visited Jan. 19, 2017, 3:13 PM).

employing less than democratic techniques—from questionable referenda and flagrant constitutional amendments to flawed elections and excessive use of force—all with a view to defying the rules of democratic alternation, pushing people to succumb or leave. What are the inherent reasons for these state leaders' behavior, why do they still succeed, what are the consequences for those voicing opposition, and what role is there to be played by international law in contributing to curtailing these seemingly unbounded and perpetual presidencies—or is the alternative worse?

This paper aims at highlighting some of the most notorious cases of close to unlimited governance, discussing underlying reasons for the status quo and potential contributions international law may offer in terms of safeguarding the human rights of the population and inducing a path towards democratic alternation. On a related level, the article sets out to demonstrate that the approach taken thus far towards African countries by international—particularly European—actors with a view to stemming the flow of refugees and irregular migrants coming to their borders is shortsighted at best, if not utterly misconceived, even if moral considerations were to be set aside. As both the lack of prospects of democratic alternation and migration are interrelated, it is argued that only by addressing the former head-on, may the demand or need for the latter be sustainably reduced.

Hence, after exemplifying the systemic problem of bad governance by depicting a number of pertinent cases with similar traits of character situated in Sub-Saharan Africa, this paper will regard the ensuing consequences of this state of affairs through the lenses of refugee law—prior to discussing the various steps taken in particular by European actors in reaction to these consequences. Recognizing that addressing the causes of irregular migration is necessary, but far from sufficient, the ensuing section will point to underlying root causes as the *explanans* of refugee and migratory flows, and look for ways to tackle those root causes.

II. BACKDROP SUB-SAHARAN AFRICA

Africa, particularly Sub-Saharan Africa, represents the region with the youngest and fastest growing population in the world, yet also consists of many of the poorest countries on the globe.³ At the same time, a number of the longest-sitting state leaders display various common traits, aimed at resisting democratic alternation, including flawed referenda, hasty constitutional amendments, political violence, and other forms of exclusion, thus resulting in some instances in a lack of alternation over the course of

3. Mark Anderson, *Sub-Saharan Africa's Youth Population Offers "Enormous Potential"*, *GUARDIAN* (Nov. 18, 2014), <https://www.theguardian.com/global-development/2014/nov/18/subsaharan-africa-youth-population-potential>.

more than thirty years.⁴ Several countries which are negatively concerned in that way will be depicted below, in a geographical fashion, traveling from east to west.

A. Angola

Angola adopted a new constitution in 2010, opening for the sitting president, José Eduardo dos Santos, to ultimately sit for another ten years at the helmet, despite having accumulated already more than three decades in power.⁵ Historically, the head of the majority party automatically assumes the presidency, which, in real and democratic contests elsewhere is neither unusual, nor particularly questionable.⁶ Consequently, in a country dominated by one party, controlled by one strongman, it effectively leads to a freeze in alternation. To be true, the Constitution which, in many other regards conveys the impression, at first sight, of epitomizing human rights protection and modern division of power,⁷ also includes a clause according to which the president may be removed by parliament.⁸ But for this removal to happen, the Supreme Court or Constitutional Court, respectively, needs to approve, and all judges of these Courts are and have been appointed by the President.⁹ Furthermore, while the Constitution states that the president's term shall last for five years, and fixes the maximum length in office to two terms,¹⁰ rendering former presidents who have already served two terms of office ineligible for election¹¹ and declaring constitutional referenda impermissible,¹² these are only ostensible hindrances. The president or one third of the members of the National Assembly may initiate a revision of the Constitution,¹³ which requires only a two-thirds majority in Parliament,¹⁴ and would become effective without a grace period, such as an election cycle. The enumeration of material limits to constitutional alternations is rather

4. Ken Opalo, *Term Limits and Democratic Consolidation in Sub-Saharan Africa: Lesson from Burundi*, CONSTITUTIONNET (Jan. 30, 2015), <http://www.constitutionnet.org/news/term-limits-and-democratic-consolidation-sub-saharan-africa-lessons-burundi>.

5. Celia W. Dugger, *Angola Moves to Make President Stronger*, N.Y. TIMES (Jan. 21, 2010), <http://www.nytimes.com/2010/01/22/world/africa/22angola.html>.

6. *Id.*

7. CONSTITUTION art. 2, §§ 1–2 (2010) (Angl.).

8. *Id.* at art. 161(m).

9. *Id.* at art. 129, §§ 3–5.

10. *Id.* at art. 113, §§ 1–2.

11. *Id.* at art. 110, §§ 1–2(a–h).

12. CONSTITUTION art. 168, § 3 (2010) (Angl.).

13. *Id.* at art. 233.

14. *Id.* at art. 235, § 2.

vague, and is silent with respect to term limits.¹⁵ Constitutional inertia or other constitutional safeguards thus appear to be largely absent.

B. Congo-Brazzaville (Republic of Congo)

In the Republic of Congo (Congo-Brazzaville), the sitting president Denis Sassou-Nguesso, already reigning for a total of more than thirty-two years, aimed at preserving his grip on power by changing the Constitution of 2002.¹⁶ This Constitution stated that no one may be president for more than two consecutive terms,¹⁷ and no one aged seventy years or more may be eligible to stand for office.¹⁸ Sassou-Nguesso would, even if one were to start the count of years after the 2002 constitution came into force, have exceeded his term limits in 2016, and he had already turned seventy-two years of age.¹⁹ Hence, Sassou-Nguesso pushed through a referendum in the fall of 2015 with a view to changing those pertinent constitutional limitations, intimidated the opposition—which eventually boycotted the referendum—and claimed a more than ninety percent approval rate for the constitutional amendment.²⁰ The fact that voter turnout was probably below five percent, did not bother him. Apparently, no minimum participation seems to be required.²¹ Based on those results, the Constitution was changed, now removing presidential age-limitations,²² and opening for three presidential terms.²³ Sassou-Nguesso thus claimed eligibility for yet another term.²⁴ There were elections held with widespread repression and documented electoral fraud, most opposition candidates were jailed or fled the country,

15. *See id.* at art. 236.

16. *Congo backs Sassou Nguesso Third-Term Bid by Landslide*, BBC NEWS (Oct. 27, 2015), <http://www.bbc.com/news/world-africa-34646310>.

17. CONSTITUTION art. 57 (2002) (Congo) (the Constitution was drafted in 2001, but adopted following a referendum held on Jan. 20, 2002); *cf.* CONSTITUTION art. 65 (2015) (Congo) (comparing that at that time, the term length was still seven years though).

18. CONSTITUTION art. 58 (2002) (Congo).

19. Grace Magu, *Congo to Vote on Extending the Two Term Presidential Limit*, FAMILY.TODAY (Oct. 6, 2015), <http://familynews.today/congo-to-vote-on-extending-the-two-term-presidential-limit1277-153.htm>.

20. *Congo-Brazzaville: 92% Des Électeurs Pour Une Nouvelle Constitution*, RFI (Nov. 27, 2015), <http://www.rfi.fr/afrique/20151027-congo-brazzaville-92-electeurs-favorables-nouvelle-constitution>.

21. *Id.*

22. *Cf.* CONSTITUTION art. 66 (2015) (Congo).

23. *Id.* at art. 65 (distinguishing that the only concession was that presidential terms henceforth would last for five instead of seven years).

24. *Congo-Brazzaville: Referendum Passes Allowing President to Extend Rule*, ALLAFRICA (Oct. 27, 2015), <http://allafrica.com/stories/201510270558.html>.

and Sassou-Nguesso proclaimed himself winner.²⁵ Apart from flagrant violations even of established legal and constitutional provisions, no constitutional inertia or other constitutional safeguards²⁶ exist against what James Madison once described as the danger of arbitrary government and the current mores of oppressive majorities, or, as here, oppression itself.²⁷

C. *The Democratic Republic of the Congo (DRC)*

Meanwhile, a similar attempt at extending the constitutionally prescribed term limits occurred in neighboring DRC, where the sitting president Joseph Kabila's second and last reelection term was up in November 2016.²⁸ Unable to push constitutional changes regarding presidential term limits directly through, which, according to Article 220 of the Constitution of 2006, could not be the object of revision,²⁹ he opted for a subtle twist: the '*glissement*', or 'slip'.³⁰ The argument goes as follows, according to Article 70 of the Constitution,³¹ the president remains in power until elections of a new president have been concluded.³² Hence, as long as no new elections have taken place, which the current regime seems to do everything to prevent, Kabila shall remain in power.³³ Maximizing on this vague definition, the president and his followers seem to have done

25. Edward McAllister, *EU and U.S. Condemn Post-Election Violence in Republic of Congo*, REUTERS (Apr. 8, 2016, 2:14 PM), <http://www.reuters.com/article/us-congo-violence-idUSKCN0X51BV>.

26. *E.g.*, CONSTITUTION art. 85 (2015) (Congo) (requiring a two-thirds majority in parliament and/or the coming into force of any constitutional amendments not until after an ensuing parliament has been elected). The president and members of parliament have a concurrent right to propose constitutional revisions. If the president initiates a revision, and the Supreme Court (whose members according to art. 172 are appointed for life by the president) does not object, the revision proposal may directly be submitted to a referendum. Hence, also the provisions of the Constitution of 2015 hardly qualify as constitutional safeguards properly so called, *see* CONSTITUTION art. 172, 241 (2015) (Congo).

27. THE FEDERALIST NO. 51 (James Madison).

28. Maud Jullien, *DR Congo President Unlikely to Give Up Power*, BBC NEWS (Dec. 23, 2015), <http://www.bbc.com/news/world-africa-35072001>.

29. *Compare id.* (the current president is suspected of staying in power past his presidential term) with CONSTITUTION art. 70, 220 (2006) (Dem. Rep. Congo) (the length and number of presidential terms may not be changed, and hence are fixed according to art. 70 to a five-year term, renewable once).

30. William Clowes, *DR Congo's Joseph Kabila is Taking a Slippery Path to a Third Term*, QUARTZ AFR. (Dec. 9, 2015), <https://qz.com/569612/dr-congos-joseph-kabila-is-taking-a-slippery-path-to-a-third-term/>.

31. CONSTITUTION art. 70, § 2 (2006) (Dem. Rep. Congo).

32. *Id.*

33. *Cf.* Xavier Monnier, *L'art de Retarder Les Élections en RDC, Raconté Par l'un de Ses Stratèges*, LE MONDE (July 15, 2016, 9:29 AM), http://www.lemonde.fr/afrique/article/2016/07/18/l-art-de-retarder-les-elections-en-rdc-raconte-par-l-un-de-ses-strategies_4971074_3212.html.

everything to render the timely organization of elections even logistically impossible.³⁴ Demonstrations in support of respecting the constitution, organizing elections, and requesting the president to respect the term limits, were met with force, resulting in at least fifty-three deaths and several hundred arbitrary arrests.³⁵ When the opposition denounced such interpretation as unconstitutional, and even appealed to the Constitutional Court, the Court voted in favor of the president's view.³⁶ However, as it turned out, the Constitutional Court's judgment was unconstitutional itself even if judged by its own standards and legal basis.³⁷ The Constitutional Court consists of nine judges, seven are needed for a quorum, but only five were actually present—some had excused themselves as sick, others had left the country.³⁸ Meanwhile, the stalemate continued and it was only when the National Episcopal Conference of Congo (CENCO)³⁹ intervened that some negotiations between opposition and governing party occurred, with a view to finding a peaceful solution to the conflict. The talks under the aegis of CENCO eventually yielded an agreement, under the terms of which presidential elections were to be held by the end of 2017, at which time at the latest president Kabila was to resign definitely, the opposition was to get to choose the prime minister, and the head of the Independent National Electoral Commission (CENI)⁴⁰ supervising the preparations for the long-overdue elections.⁴¹ However, solution of remaining points of discord and, above all, implementation of the terms of the agreement, have come to an impasse, with the governing party continuing what appear to be stalling tactics. And with every day that passes, CENCO is more likely to discontinue offering its good offices, and preparations for the envisioned presidential election before the end of the year—the paramount precondition of the agreement—less likely to see the light of day. The recent death of Etienne Tshisekedi, the historical,

34. *Id.*

35. *Cf. Violences de Septembre en RDC: L'ONU Accuse Les Forces de Sécurité*, RFI: AFRIQUE (Oct. 21, 2016), <http://www.rfi.fr/afrique/20161021-violences-septembre-rdc-forces-ordre-accusees-onu>.

36. David Kode, *Movement Builds to Stop Congo's President from Postponing Election*, WAGINGNONVIOLENCE.ORG (Dec. 2, 2016), <http://wagingnonviolence.org/2016/12/congo-kabila-postpone-election/>.

37. *RDC: Les Juges de la Cour Constitutionnelle à Couteaux Tirés*, RFI: AFRIQUE (Nov. 4, 2016), <http://www.rfi.fr/afrique/20161104-rdc-juges-cour-constitutionnelle-couteaux-tires>.

38. *Id.*

39. Conférence Episcopale Nationale du Congo (CENCO).

40. Commission Électorale Nationale Indépendante (CENI).

41. *Cf. RDC: Signature de l'Accord Par la Majorité et l'Opposition*, RFI: AFRIQUE (Dec. 31, 2016), <http://www.rfi.fr/afrique/20161231-rdc-majorite-opposition-cenco-kabila-joseph-eveques>.

most respected and uniting opposition figure, designated as head of CENI for the period of transition, does not bode well for the further process.⁴²

D. Rwanda

Also, Rwanda has seen increasing repression and a decreasing political space over the past few years.⁴³ Long hailed as an exemplary country in a Sub-Saharan, and post-violence context, and strategically playing the ‘genocide card’ whenever criticism towards human rights abuses at the hand of the government mounted, the political situation in the country has adopted most of the traits of a one-party state.⁴⁴ There seems to exist no real opposition to Paul Kagame, and claims to the contrary, such as pointing to the so-called ‘Green Party’, the only registered and authorized opposition party, appear to be a means of paying lip service to foreign donors.⁴⁵ A recent attempted visit by a foreign reporter demonstrated that the ‘Green Party’ was barely visible in the streets, even its headquarters were hard to find, and hardly staffed.⁴⁶ In such an environment, Kagame pushed through a referendum for a constitutional amendment removing the limitation of sitting for a maximum of two terms as president.⁴⁷ Taking a climate of repression and control, reports of forced voting, and insufficient time to even debate the amendments to the constitution into account, it is probably not surprising that the majority of Rwandans approved these changes, now effectively allowing Kagame to stay on for a total of more than thirty years.⁴⁸ But is a constitutional amendment, even if approved by a large majority, valid in such a context? The idiosyncratic nature of the constitutional amendment,⁴⁹

42. Cf. *Mort de Tshisekedi en RDC: Quel Impact Sur le Dialogue Politique?*, RFI: AFRIQUE (Feb. 2, 2016), <http://www.rfi.fr/afrique/20170202-mort-tshisekedi-rdc-quel-impact-le-dialogue-politique>.

43. Omar S. McDoom, *To Aid, or Not to Aid? The Case of Rwanda*, UNITED NATIONS U. (Apr. 29, 2013), <https://unu.edu/publications/articles/to-aid-or-not-to-aid-the-case-of-rwanda.html>.

44. Filip Reyntjens, *Rwanda: Progress or Powder Keg?*, 26 J. DEMOCRACY 19, 22 (2015); *World Bank: Economic Growth in Africa Down to 1.6 pct*, DAILY SABAH (Oct. 3, 2016), <http://www.dailysabah.com/economy/2016/10/04/world-bank-economic-growth-in-africa-down-to-16-pct>.

45. Bruno Meyerfeld, *Au Rwanda, Les Opposants se Font Discrets*, LE MONDE (Aug. 9, 2016, 11:41 AM), http://www.lemonde.fr/international/article/2016/08/09/au-rwanda-les-opposants-se-font-discrets_4980295_3210.html.

46. *Id.*

47. Jesko Johannsen, *Rwandans Head to Polls in Controversial Referendum*, DEUTSCHE WELLE (Dec. 17, 2015), <http://www.dw.com/en/rwandans-head-to-polls-in-controversial-referendum/a-18922926>.

48. *Id.*

49. Cf. Filip Reyntjens, *The Changes Made to Rwanda’s Constitution are Peculiar—Here’s Why*, CONVERSATION (Jan. 28, 2016, 9:25 AM), <http://theconversation.com/the-changes-made-to-rwandas-constitution-are-peculiar-heres-why-53771>.

tailored to one person only, Kagame, has been criticized for undermining democratic change of government contrary also to article 23 of the African Charter of Democracy, Elections and Governance, which states that “illegal means of accessing or maintaining power constitute an unconstitutional change of government and shall draw appropriate sanctions by the African Union (AU).”⁵⁰

E. Burundi

The final examples of bad governance in this belt of African Great Lakes countries pertains to Burundi, where the sitting president, Pierre Nkurunziza, pushed through a disputed third mandate, claiming that the term limits applied only to a president who, as required by the constitution, was elected ‘by the people’, i.e. “by universal direct suffrage.”⁵¹ However, Nkurunziza’s first term came about through negotiations following the peace agreements that ended the civil war in Burundi, and hence he was elected by Parliament then, not by the people.⁵² But instead of having an open political dialogue, as in the countries depicted above, a similar pattern of repression and political violence emerged, where even judges on the Constitutional Court apparently had been pressured to decide the question, raised by the opposition, of an unconstitutional extension of term limits, as in line with the president’s view.⁵³ At least one of these judges soon afterwards fled the country and reportedly applied for asylum.⁵⁴

Furthermore, Burundi has in recent months refused to cooperate with the United Nations (U.N.), including giving a group of experts, among them the AU’s Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons (IDPs), access to continue their independent investigations into the security and human rights situation in the country.⁵⁵

50. Cf. Ivan R. Mugisha, *EU Questions Constitutional Amendment in Rwanda*, E. AFR. (Dec. 4, 2015, 4:40 PM), <http://www.theeastafrican.co.ke/news/EU-questions-constitutional-amendmentinRwanda/2558-2984382-gb8oyt/index.html>.

51. Cf. CONSTITUTION art. 96 (2005) (Burundi).

52. Morgan Winsor, *Burundi Elections 2015: President Nkurunziza Should Withdraw Third Term Bid, Former Leader Says*, INT’L BUS. TIMES (May 4, 2015, 4:40 PM), <http://www.ibtimes.com/burundi-elections-2015-president-nkurunziza-should-withdraw-third-term-bid-former-1907861>.

53. Edmund Kagire, *Exiled Burundian Judge Sylvere Nimpagaritse Speaks Out*, E. AFR. (May 7, 2015, 8:31 PM), <http://www.theeastafrican.co.ke/news/Exiled-Burundian-judge-SylvereNimpagaritse-speaks-out/-/2558/2709602/-/j3371vz/-/index.html>.

54. See *id.*

55. Matthew Russell Lee, *From Burundi, UN Human Rights Experts Banned, Unable to Deploy, OHCHR Says*, INNER CITY PRESS (Jan. 26, 2016), <http://www.innercitypress.com/burundi237banthirdterm012616.html>; *Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons*, AFR. COMMISSION ON HUM. & PEOPLES’ RTS.,

Based on what the experts had seen and researched thus far, the United Nations Independent Investigation on Burundi (UNIIB) report stated, *inter alia*, that there were serious reasons for believing that “gross human rights violations [which may] amount to crimes against humanity” may have been committed.⁵⁶ The report was published in September 2016.⁵⁷ A few weeks later, the Burundian government announced that it would withdraw from the International Criminal Court (ICC),⁵⁸ the sole international court with jurisdiction over international crimes, including crimes against humanity, without limitations in terms of temporal or geographical scope, or official capacity of the accused, for example as head of state or government.⁵⁹

III. THE CONSEQUENCES OF BAD GOVERNANCE

What the above countries have in common is that wherever possible, they tried to at least give the impression of paying heed to constitutional rules, basing changes to term limits or other constitutional provisions benefitting the president and the ruling party on constitutional provisions presumably allowing just that—without regard to the context and form in which such changes could be regarded as legitimate. That some of these provisions even opened for certain term extensions and other revisions that may benefit the very government proposing the changes, without the common constitutional safeguards of e.g. at least one electoral period between the suggested revision and the coming into force of such changes, may be regarded as a flaw in itself. But combined with an environment of repression and abuse of power, precluding any meaningful political opposition to the ruling party and discussion of the proposed changes, the various modes of constitutional amendments may hardly be described as legitimate from an objective point of view⁶⁰—they would often more appropriately be called constitutional coups d'état.

<http://www.achpr.org/mechanisms/refugees-and-internally-displaced-persons/> (last visited Apr. 10, 2017).

56. Cf. Rep. of the U.N. Indep. Investigation on Burundi (UNIIB) on Its Thirty-Third Session, U.N. Doc S-24/1, at 14 (2016) [hereinafter Rep. of the UNIIB].

57. *Id.*

58. See *Burundi: ICC Withdrawal Major Loss to Victims*, HUM. RTS. WATCH (Oct. 27, 2016, 12:00 AM), <https://www.hrw.org/news/2016/10/27/burundi-icc-withdrawal-major-loss-victims>.

59. Other international courts with similar subject matter jurisdiction, such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) had their competences restricted in geographical (*cf.* ICTY Statute, art. 1) or temporal (*cf.* ICTR Statute, art. 1) scope.

60. See *Democratic Republic of Congo: Background and U.S. Relations*, EVERYCRS REPORT.COM (Sept. 6, 2016), <https://www.everycrsreport.com/reports/R43166.html>.

Also, quite telling when it comes to the disregard of the true (teleological) meaning of constitutional provisions are the lack of respect paid to other, less visible provisions, or, more precisely, the creative inventions in order to hide unconstitutional behavior. Article 96 of the constitution of the DRC for example prohibits the president to be involved in any professional activity during his terms in office, though not his family.⁶¹ Recent research revealed that Joseph Kabila's family had an interest in, and often controlled, at least seventy companies, in almost any sector of importance, from banking to agriculture, from petroleum and mining to transportation and hotel business, in the DRC but also abroad, resulting in contracts worth several hundred million dollars.⁶² Joseph Kabila himself is associated directly only with two of these companies.⁶³ But there seems to be little doubt as to the origin of all the other family contracts, and even Kabila's diplomatic adviser, Barnabe Kikaya Bin Karubi, is quoted as trivializing the results of that research by stating that there is nothing unusual about the members of Kabila's family having some advantages—after all, it's the presidential family.⁶⁴

Perhaps unsurprisingly, given the population strata, context of suppression and meager outlook for improvement, many, and especially young, people flee, migrate, or otherwise try to leave the area of conflict, and move to neighboring areas or even beyond, seeking protection.⁶⁵

A. *Refugees and Migrants*

While there is no universally accepted legal definition of migration, and hence of 'irregular' or 'forced migrants', the latter are sometimes referred to as "persons [either not having applied] for asylum [yet or] asylum seekers

61. CONSTITUTION art. 96 (2006) (Dem. Rep. Congo).

62. Michael Kavanagh, Thomas Wilson & Franz Wild, *With His Family's Fortune at Stake, President Kabila Digs In*, BLOOMBERG (Dec. 15, 2016, 12:01 AM), <https://www.bloomberg.com/news/features/2016-12-15/with-his-family-fortune-at-stake-congo-president-kabila-digs-in>.

63. *See id.*

64. *See RDC: Bloomberg Révèle l'Empire Économique Bâti Par la Famille Kabila*, RFI (Dec. 16, 2016), <http://www.rfi.fr/afrique/20161216-rdc-agence-bloomberg-revele-empire-economique-bati-famille-kabila-president>.

65. Lucy Beck & Leo Dobbs ed., *On the Run, Alone and Young: Congolese Children Flee to Uganda*, UNHCR (Feb. 7, 2013), <http://www.unhcr.org/news/latest/2013/2/5113b67b6/run-alone-young-congolese-children-flee-uganda.html>; Esther Yu His Lee, *The Huge Refugee Crisis That's Already Displaced 220,000 People*, THINKPROGRESS (Mar. 17, 2016), <https://thinkprogress.org/the-huge-refugee-crisis-thats-already-displaced-220-000-people-71e96cbb5ea0#.t1hiv48np>.

whose applications [were deemed] inadmissible.”⁶⁶ The terms refugees and migrants are often used interchangeably, not least in public and popular, and certainly in populist discourse, and should be kept apart, especially when discussing rights attached to the respective status.⁶⁷ However, for the purpose of the ensuing discussion, ‘irregular migration’ may be used to encompass (often large) movements of refugees and migrants alike, as the focus will be on the act of fleeing or migrating, not on the legal status eventually sought, received, or denied. IDPs on the other hand could be described as inhibited refugees, potentially having suffered the same persecution as ‘conventional refugees’, but not having been able to cross an international border.⁶⁸ Hence, they are unfortunately easily overlooked as, alas, also here not directly relevant to this article.

Whether one employs the European Union (EU) definition of a refugee included in EU Qualification Directive 2011/95, the 1969 Organization of African Unity (OAU) definition, or in the United States, section 101(a)(42) of the Immigration and Nationality Act (INA), they are all based on the 1951 United Nations High Commissioner for Refugees (UNHCR) Refugee Convention as the common framework.⁶⁹

“Refugee” means a third-country national who,

66. Press Release, European Commission, Implementing the EU-Turkey Agreement—Questions and Answers, RAPID 16/1221 (Apr. 4, 2016) [hereinafter Implementing the EU-Turkey Agreement].

67. ‘Refugees’ and ‘Migrants’—Frequently Asked Questions (FAQs), UNHCR (Mar. 16, 2016), <http://www.unhcr.org/news/latest/2016/3/56e95c676/refugees-migrants-frequently-asked-questions-faqs.html>; Joshua Keating, *The Difference Between Refugee and Migrant Matters*, SLATEST (Aug. 28, 2015, 10:56 AM), http://www.slate.com/blogs/the_slatest/2015/08/28/the_terms_migrant_and_refugee_should_not_be_used_interchangeably_the_difference.html.

68. *Key Migration Terms*, INT’L ORG. FOR MIGRATION, <http://www.iom.int/key-migration-terms> (last visited Feb. 19, 2017).

69. 8 U.S.C. § 1101 (2016); Council Directive 337/9, art. 2, 2011 O.J. (L 337) 9, 13 (EU); G.A. Res. 429 (V), at 48 (Dec. 14, 1950); *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, AFR. COMMISSION ON HUM & PEOPLES’ RTS. (Sept. 10, 1969), http://www.achpr.org/files/instruments/refugee-convention/achpr_instr_conv_refug_eng.pdf.

owing to [a] well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, [or membership of a particular social group,] is outside the country of nationality and is unable or, owing to such fear . . . is unwilling to avail himself [or herself] of the protection of that country; or [a stateless person] who, . . . being outside [of] the country of his [or her] former habitual residence [for the same reasons as mentioned above,] is unable or, owing to such fear, . . . is unwilling to return to it⁷⁰

Additionally, so-called subsidiary protection may be available to a person who does not qualify as a refugee but “in respect of whom substantial grounds have been shown for believing that the person concerned, if returned . . . would face a real risk of suffering serious harm”⁷¹

B. *The Drivers of Irregular Migration*

As had been stated e.g. in the aforementioned UNIIB report, but is valid, *mutatis mutandis*, across the countries discussed above, and beyond the Sub-Saharan region, the civil war in Burundi that ended in 2005 had a devastating effect on the economy and living standards.⁷² Following the Arusha Agreement, Burundi experienced a period of some stability and sustainable growth.⁷³ The political crisis now, however, is reversing such progress.⁷⁴ The climate of violence and repression has disrupted economic activity.⁷⁵ Half of the youth are estimated to be unemployed and the majority of the demonstrators against the third presidential mandate were disenchanted youth.⁷⁶ Their high numbers may also provide a large source of recruitment for nascent rebel and other armed opposition movements.⁷⁷ But the latter is just one additional concern as to what neglected or not appropriately dealt with crises situations may lead to, also potentially regarding countries outside the region, including overseas. However, as far as refugee and other migration flows are concerned, the UNIIB investigations clearly “confirmed

70. G. A. Res. 429 (V), *supra* note 69, at 48.

71. María-Teresa Gil-Bazo, *Refugee Status, Subsidiary Protection, and the Right to Be Granted Asylum Under EC Law*, 136 NEW ISSUES REFUGEE RES. (UNHCR) 1, 11 (Nov. 20, 2006).

72. *See* Rep. of the UNIIB, *supra* note 56, at 14.

73. *Id.* at 14–15.

74. *Id.* at 15.

75. *Id.*

76. Rep. of the UNIIB, *supra* note 56, at 15. Employment here includes any kind of work, not just work on a regular salary, which anyways pertains to only a tiny fraction of the work force.

77. *Cf. Id.*

the impact of the political crisis on the massive outflow” of people.⁷⁸ It is also in line with common patterns of drivers of migration.

In general terms, drivers of migration consist of push and pull factors.⁷⁹ Push factors include armed conflict, in particular prolonged armed conflict, where Iraq, Syria, Afghanistan, but not least the conflict-ridden eastern part of the DRC would be prime examples.⁸⁰ Another strong, contributing push factor is the political crisis, with, usually, concomitant political violence—as is currently taking place throughout the Sub-Saharan region.⁸¹ As exemplified above, political crisis often carries with it situations of generalized or indiscriminate violence, individual insecurity, high unemployment, economic breakdown, sometimes additionally driven by natural disasters, utter lack of opportunity, and a sense of hopelessness. These factors are often interrelated.

Pull factors often, but not always, represent the mirror image of push factors, with protection, political freedom, security, access to health (care), etc., looming large on the list.⁸²

As may be seen, there is some reciprocity among push and pull factors. Also, not all of these factors are related to or limited to ‘refugees’.

IV. ADDRESSING THE CAUSES OF REFUGEE CRISES

In September 2016, the United Nations General Assembly (GA) for the first time in the so-called New York Declaration for Refugees and Migrants explicitly acknowledged a connection between crises situations, the rule of law, or lack thereof, as well as marginalization, exclusion and the lack of development and large movements of refugees and migrants.⁸³ The GA pledged to “work with countries of origin to strengthen their capacities.”⁸⁴

Furthermore,

78 *Id.*

79. *Migration Push/Pull Factors*, APHG CLASS WIKI (Jan. 9, 2016, 10:45 PM), http://lewishistoricalsociety.com/wiki2011/tiki-read_article.php?articleId=28.

80. *See, e.g., Root Causes of Migration—Fact Sheet*, ONE AM., <https://www.weareoneamerica.org/root-causes-migration-fact-sheet> (last visited Feb. 19, 2017).

81. *The Sub-Saharan Security Tracker*, COUNCIL ON FOREIGN REL., <http://www.cfr.org/africa-sub-saharan/sub-saharan-security-tracker/p37884> (last visited Feb. 19, 2017).

82. *See Migration Push/Pull Factors*, *supra* note 79.

83. *Draft for Adoption*, U.N. (July 29, 2016), http://www.un.org/en/development/desa/population/migration/events/ga/documents/2016/1August2016/Outcome_Declaration.pdf; Press Release, U.N., *New York Declaration for Refugees and Migrants Adopted by all Member States at Historic UN Summit*, U.N. Press Release (Sept. 19, 2016).

84. G.A. Res. A/71/1, ¶ 12 (Oct. 3, 2016).

[r]ecognizing that armed conflict, persecution and violence, including terrorism, are among the factors which give rise to large refugee movements . . . [the signatories stated their intention] to address the root causes of such crisis situations and to prevent or resolve conflict by peaceful means [and to] work in every way possible for the peaceful settlement of disputes, the prevention of conflict and the achievement of the long-term political solutions required.⁸⁵

Acknowledging further that “[t]he promotion of human rights is also critical,” the GA declared: “In addition, we will promote good governance, the rule of law, effective, accountable and inclusive institutions”⁸⁶

It remains to be seen what may come of such a GA Declaration, non-legally binding as it is in character. Furthermore, while some of the ideas expressed herein are laudable, there is reason to be concerned that the core of the problem, here only stated as an addendum, as will be argued below, will be overlooked or so vaguely defined as to be lost out of sight.

The current, prevailing way of addressing refugee flows may be exemplified by the region experiencing an unprecedented increase in people from the aforementioned and other crisis regions, including Syria, coming to their door steps, and applying for protection or other rights of stay. In order to stem the flow of new arrivals, the EU concluded an agreement with Turkey, one of the main countries through which migrants and refugees to Europe would travel, essentially offering money for border control, and tightened frontiers.⁸⁷

85. *Id.* at ¶ 64.

86. *Id.*

87. Press Release, General Assembly, General Assembly Adopts Declaration for Refugees and Migrants, as United Nations, International Organization for Migration Sign Key Agreement, U.N. Press Release GA/11820 (Sept. 19, 2016).

Under the terms of the deal, all new ‘irregular migrants’—defined as persons either not having applied for asylum or asylum-seekers whose applications were deemed inadmissible—crossing from Turkey to the Greek islands would be returned to Turkey. In other words, for every returned Syrian (the largest group of ‘irregular migrants’), another Syrian would be resettled to the EU from Turkey directly. In addition, Turkey promised to “take any necessary measures to prevent new sea or land routes from Turkey to the EU.” In exchange, the EU would allocate [three] billion [euros] under the Facility for Refugees in Turkey, with an additional [three] billion [euros] to be mobilized by the end of 2018. Lastly, and perhaps the main motivating factor for Ankara to enter into this accord, the EU promised an accelerated process to lift visa requirements for Turkish citizens.

In parallel proceedings, the EU is also pushing ahead with a migrant pact on Africa, offering similar incentives—a share in the EU Emergency Trust Fund for Africa—to a number of African countries in exchange for stemming the flow of potential refugees to Europe. The deal, already deemed “morally unacceptable” by several human rights organizations, may also be questionable on legal grounds.

Both the EU-Turkey and EU-Africa agreements include the contribution of large sums of money to enhance the situation for refugees already in the respective regions by creating employment and development programs. Although this approach addresses some of the root causes of migration, the problem is that it relies heavily on partners that, at least in part, have a rather dubious track record when it comes to the protection of human rights. These regimes, due to their repressive nature, represent the very reason a number of bona fides refugees try to leave.⁸⁸

And looking at examples from the recent past should suffice as a reminder to tread carefully.

88. Implementing the EU-Turkey Agreement, *supra* note 66; Susan M. Akram & Tom Syring, *Needed in Europe: A Comprehensive Plan of Action on Refugees*, https://www.asil.org/sites/default/files/documents/IRLIGblog_AkramSyring.docx (last visited Feb. 19, 2017) [hereinafter *A Comprehensive Plan of Action on Refugees*]; see also *Human Rights Organizations Slam New EU-Africa Migrant Pact*, DEUTSCHE WELLE (June 29, 2016), http://www.dw.com/en/human-rights-organizations-slamneweu-africamigrantpact/a19365407?mc_cid=c9b2922399&mc_eid=1ca8e5dc24%20; Jeanne Park, *Europe's Migration Crisis*, COUNCIL ON FOREIGN REL., <http://www.cfr.org/refugees-and-the-displaced/europes-migration-crisis/p32874> (last modified Sept. 23, 2015); see generally European Commission Press Release RAPID 15/6056, A European Union Emergency Trust Fund for Africa (Nov. 12, 2015); European Commission Press Release RAPID 15/5597, Refugee Crisis: European Commission Takes Decisive Action—Questions and Answers (Sept. 9, 2015); *The EU Emergency Trust Fund for Africa*, EUR.

Prior to the ousting and death of Muammar Gaddafi, Italy and Libya reportedly executed an agreement that compensated Libya in return for cracking down on illegal migration routes stemming from, or in any case leading through, Libya.⁸⁹ That agreement included an opening for Italian authorities to swiftly return intercepted boat migrants to Libya—a country which is not a State Party to the Refugee Convention—before they could even reach Italian shores.⁹⁰ The agreement was criticized for not sufficiently differentiating between illegal migrants and genuine refugees, and in many cases not even having the necessary procedures in place for making a well-informed decision in regard to refugee status determinations of the people intercepted at sea before they were returned.⁹¹

COMMISSION: INT'L COOPERATION & DEV., http://ec.europa.eu/europeaid/regions/africa/eu-emergency-trust-fund-africa_en (last visited Feb. 19, 2017); *Turkey Warns EU: Visa Deal or No Migrant Pact*, MIDDLE E. EYE (Apr. 21, 2016, 9:31 PM), <http://www.middleeasteye.net/news/turkey-warns-eu-visa-deal-or-no-migrant-accord-866776688>.

89. See *Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers*, HUM. RTS. WATCH (Sept. 21, 2009) <http://www.hrw.org/reports/2009/09/21/pushed-back-pushed-around-0> [hereinafter *Pushed Back*]; see also *Italy to Pay Libya \$5 Billion*, N.Y. TIMES (Aug. 31, 2008), <http://www.nytimes.com/2008/08/31/world/europe/31iht-italy.4.15774385.html> [hereinafter *Italy to Pay*].

90. *Pushed Back*, *supra* note 89; *Italy to Pay*, *supra* note 89.

91. *Pushed Back*, *supra* note 89; *Italy to Pay*, *supra* note 89.

In the 2012 case of *Hirsi Jamaa and others v. Italy*,⁹² the European Court of Human Rights, again sitting as a Grand Chamber, reiterated the gist of the judgment in *M.S.S. v. Belgium & Greece*, and observed that “Libya’s failure to comply with its international obligations was one of the facts denounced in the international reports of that country. In any event, . . . the existence of domestic laws and the ratification of international treaties guaranteeing respect for fundamental rights [as in said bilateral agreement between Italy and Libya] are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention Italy cannot evade its own responsibility by relying on its obligations arising out of bilateral agreements with Libya.”⁹³

The Court therefore unanimously held there had been a violation of Article 3 of the European Convention on Human Rights on the part of Italy by exposing the applicants to the risk of being subjected to ill-treatment in Libya and to being repatriated to Somalia and Eritrea, the respective applicants’ home countries from which they had fled.⁹⁴

Concerns have also been raised that readmission agreements, even where their conclusion would not be contrary per se to any provisions of international law, contribute to potential violations of refugee rights, including the denial of access to protection due to the accelerated procedures of expulsion which generally form part of such accords.⁹⁵ Paying-off and redirecting refugee flows in that fashion to countries less concerned with, or feeling less bound by, the Refugee Convention—and the granting of rights pronounced therein—jeopardizes the fairness of the asylum system and thus the very idea underlying the concept of granting protection to those in need.⁹⁶

Hence, the EU should think carefully about not entering into new, similar, potentially abusive, if not outright illegal, agreements—whether under the guise of development aid or other cooperation.

92. See *Hirsi Jamaa & Others v. Italy*, (No. 27765), Eur. Ct. H.R. 36 (2012); see also Tom Syring, *The Sirens and the Emperor: The European Union Between Attraction and Intervention*, in STILL WAITING FOR TOMORROW: THE LAW AND POLITICS OF UNRESOLVED REFUGEE CRISES 269 (Susan Akram & Tom Syring ed., 2014).

93. *Hirsi Jamaa & Others v. Italy*, (No. 27765), Eur. Ct. H.R. 36 (2012).

94. Syring, *supra*, note 92.

95. *Id.*; see also Mariagiulia Giuffrè, *Readmission Agreements and Refugee Rights: From a Critique to a Proposal*, 32 REFUGEE SURV. Q. 79, 79–111 (2013) (arguing that, in particular situations of

Furthermore, what seems to be easily forgotten is that development aid is not neutral; to the contrary, all development aid is highly political.⁹⁷ As has been pointed out elsewhere,

[D]onors . . . usually insist that this money is politically neutral, that it does not directly benefit the political elite. This is true, as most of the money is for schools, roads, health care, and water projects. But all development is deeply political. By taking over the financing of most public services, donors take pressure off . . . the government to respond to the needs of its citizens.⁹⁸

While details of the EU migrant pact on Africa were still in the planning, the EU-Turkey deal had already formally been in force for several months.⁹⁹ It has led to a reduction of new arrivals, but the agreement continues to be fragile.¹⁰⁰ And while the EU Trust Fund for Africa claims to aim at addressing the root causes of destabilization, forced displacement and irregular migration, there is little in the draft agreements that would promise sustainable success, for lack of identifying and addressing the real underlying problems at the origin of many of the countries' deplorable state of affairs.¹⁰¹

V. ADDRESSING THE UNDERLYING ROOT CAUSES OF REFUGEE CRISES

Dr. Denis Mukwege, who for many years has provided help to “victims of gang rape and brutal sexual violence in the Democratic Republic of Congo,” said in his acceptance speech for the 2014 Sakharov Prize for Freedom of Thought that “women’s bodies have become a true battlefield and rape is being used as a weapon of war.”¹⁰² He also stated that “we have spent too much time and energy fixing the consequences of violence. It is time to take care of the causes,” and called on the EU and its member states

informal border controls and massive and sudden arrivals of migrants and refugees—as in regard to interceptions at sea—where monitoring procedures are generally lacking or insufficient, “the implementation of a readmission agreement may contribute to hinder access of asylum seekers to protection”).

96. Syring, *supra* note 92.

97. JASON K. STEARNS, *DANCING IN THE GLORY OF MONSTERS: THE COLLAPSE OF THE CONGO AND THE GREAT WAR OF AFRICA* 332 (2012).

98. *Id.*

99. *See A Comprehensive Plan of Action on Refugees*, *supra* note 88.

100. *Id.*

101. *Id.*

102. *Sakharov laureate Denis Mukwege: “Women’s Bodies Have Become a True Battlefield”*, EUR. PARLIAMENT NEWS (Nov. 26. 2014, 1:24 PM), <http://www.europarl.europa.eu/news/en/news-room/20141125STO80503/sakharov-laureate-denis-mukwege-women-s-bodies-have-become-a-true-battlefield>.

to use all instruments available to support resolving the conflicts in the region.”¹⁰³ Transferred to the question of alternation, the underlying reasons for the causes, the root causes, appear to represent the real foundational issues when it comes to solving not only the lack of democratic alternation *per se*, but also irregular migration and refugee situations. As long as mismanagement, embezzlement, systemic corruption, rampant impunity and a travesty of justice, of constitutions, and of elections are permitted, if not encouraged to take place, alternation, a hoped for democratization, and ensuing improvements for the countries affected is unlikely to materialize any time soon. The fossilization of the political systems¹⁰⁴, a prolongation of the aforementioned perpetual presidencies and of bad governance will, in turn, continue to have a devastating effect on the youth, on development, or lack thereof, and hence contribute to a continuous need for and urge of fleeing one’s country or migrating in search of a better future. And, should the situation in any of the countries detailed above explode, or what is left of a functioning state apparatus implode, taking the violent recent history of especially the Great Lakes countries of Africa into account, there is a real concern that the security situation in the entire region might severely deteriorate and eventually collapse. Hence, western donors should have all the incentives to identify and address the real, underlying root causes, instead of opting for, or anyways focusing on, shortsighted ‘quick fixes’ and concomitant outsourcing of migration control.¹⁰⁵

VI. OUTLOOK—WHAT MAY BE DONE?

Many of the Sub-Saharan countries discussed above do have elaborate and modern constitutions on paper—but abusive state leaders need to be reminded of existing constitutional provisions and held accountable for any unconstitutional changes. This cannot be done unless donors, the EU, AU, and the United States, speak with one voice. In fact, in connection with the flawed referendum in Congo-Brazzaville, changing the constitution, French Prime Minister Françoise Hollande, when asked about it, answered in quite vague terms, actually stating that he respected any state leader’s right to

103. *Id.*

104. Ahmedou Ould-Abdallah, *Après les Coups d’État Militaire, l’Union Africaine à l’épreuve des Coups d’État Civils*, LE MONDE (July 15, 2016, 10:58 A.M.), http://www.lemonde.fr/afrique/article/2016/07/15/apres-les-coups-d-etat-militaires-l-union-africaine-a-l-epreuve-des-coups-d-etat-civils_4969931_3212.html.

105. Joe Siegle, *The Political Origin of Refugee Crises*, COUNCIL ON FOREIGN REL. (May 26, 2004), <http://www.cfr.org/world/political-origin-refugee-crises/p7054#>.

consult his constituency.¹⁰⁶ There was no mentioning and no criticism of the form and context of such ‘consultations.’¹⁰⁷ Only after the equally flawed, ensuing elections and their violent aftermath did the French Foreign Minister, Jean-Marc Ayrault, eventually openly criticize Brazzaville.¹⁰⁸ Given the traditionally strong ties with and position in Congo-Brazzaville the former colonial power France has maintained, a more candid, critical stance could have made a difference.

Also, on the regional, EU level, there are tentative signs of becoming more outspoken in the face of human rights violations or electoral travesties of justice. Federica Mogherini, the EU Head of Foreign Affairs, e.g. criticized Gabon for its recent election, the very limited access given to EU election observers contrary to prior agreements, and indicated that the confidence of the people of Gabon regarding the integrity of the electoral process, may have been put at risk.¹⁰⁹ Pushing for electoral observation missions and speaking up, are important starting points, not least by thus lending the opposition some witnessing eyes. But much more is needed. Ultimately having the threat of pursuing and prosecuting state leaders’ most egregious crimes before international courts up one’s sleeve, even if those institutions for the time being are openly defied by the persons concerned, may still have an effect, as would working with the AU towards regarding constitutional coups d’état similarly critical as military coups d’état. All of the above may take a long time to realize, but the perhaps most important achievement would be a change of perspective, the realization and acknowledgement that the underlying root causes of many a refugee crisis—the denial of alternation—need to be focused on. And that could be accomplished immediately.

106. *Congo: La Position d’Hollande Sur le Réferendum Fait Polémique*, RFI: AFRIQUE (Oct. 22, 2015), <http://www.rfi.fr/france/20151022-france-francois-hollande-congo-brazzavillesurviessassounguesso>.

107. *Id.*

108. *Présidentielle Congo-Brazzaville: Fronde Internationale Contre le Dictateur*, AFR. EDUC. (Mar. 31, 2016, 11:05 PM), http://afriqueeducation.com/politique/presidentielle_congo_brazzaville_fronde_internationale_contre_le_dictateur.

109. *Cf. Gabon: L’union Européenne Ne Mâche Pas Ses Mots Après la Réélection D’Ali Bongo*, RFI: AFRIQUE (Sept. 22, 2016), <http://www.rfi.fr/afrique/20160926-gabon-reelection-ali-bongo-unioneuropeenne-mache-pas-mots>.