

REFUGEE STATUS DETERMINATION IN AFRICA

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Thirty-five years after the adoption of the Africa-specific treaty on refugees, the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, the issue of refugees remains high on the agenda of many African countries. With States increasingly carrying out individual status determinations, either under their own auspices or through the offices of the UNHCR, insufficient guidance has been given to national decision-makers on how to interpret this instrument by either the UNHCR or the African Union, in addition to which there is limited published case law available. How does the OAU Convention definition deal with issues of the interface between migration and asylum? Does the practice of African States in regularly giving sanctuary to persons escaping environmental catastrophes give rise to a right to asylum under the treaty? What about persons fleeing terrorist attacks? Is the 1951 UN Convention relating to the Status of Refugees still relevant to displaced persons in Africa? This article takes a renewed look at each of the elements of the legal definition of a “refugee” under the OAU Convention in the hope of providing some guidance to decision-makers, lawyers and asylum-seekers alike. This article finds however that many questions remain unanswered, and although a myriad of different interpretations are possible, the greatest strength of the OAU Convention appears to rest less in its specific terms than the humanitarian spirit in which it is applied.

I. INTRODUCTION AND CONTEXT

Thirty-five years after the adoption of the Africa-specific treaty on refugees, the *1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa*¹ (“OAU Convention”), the issue of refugees remains high on the agenda of many African States. At the end of 2004, there were approximately 9.2 million refugees worldwide, of which thirty per cent were

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¹ Adopted by the Assembly of Heads of State and Government, Addis Ababa, 10 Sept. 1969; entered into force 20 June 1974.

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located in Africa.² Although the majority of African refugees are granted group or *prima facie* status in host countries, States in the region are increasingly carrying out individual status determination, either under their own auspices or through the offices of the United Nations High Commissioner for Refugees (“UNHCR”). Most commonly, individual status determination is undertaken in countries of secondary or tertiary refuge, as well as in urban centres, especially capital cities. According to the UNHCR, there were 198,848 asylum-seekers³ in African countries in 2004, including 82,000 new applications.⁴ Of this total, South Africa alone received 32,600 new applications, ranking it in the top five countries worldwide.⁵ It also recorded 115,200 undecided cases for the same period.

Not all migratory movements across Africa are, however, refugee-related. Most asylum-seekers arrive within broader, complex and inter-connected migratory movements.⁶ It has been estimated that the “international migration stock” in Africa was around 16 million in 2000.⁷ Development and conservation projects, the restructuring of economies,⁸ and the effects of environmental disasters, have caused many persons to leave their homes. In addition, the demarcation of artificial State boundaries during and after the Berlin Conference of 1885 has placed a legal framework that differentiates between citizens and non-citizens over what could otherwise be described as normal population movements across tribal areas. Still others leave their countries in search of employment, as an escape from poverty, and/or in the hope of a better life. Labour migration has been facilitated in Africa by regional economic organisations that have fostered the free flow of labour, the diversification of migration destinations, and the prevalence of smuggling networks.⁹ In the absence of regulatory systems for such persons it is not uncommon that they may also apply to remain in host countries through asylum channels. Others, especially young men, fed up with life in refugee camps that provide relative protection, albeit no long-term future, leave on travels that can last many years and which may take them to a range of African and

2 UNHCR, *Global Refugee Trends 2004* (Geneva, 17 June 2005).

3 For the purposes of this article, “asylum-seeker” refers to an individual who has applied for refugee status but who not yet been recognised as a refugee.

4 UNHCR, *Global Refugee Trends 2004* (Geneva, 17 June 2005). Note that these figures are organised according to operational divisions of the UNHCR and therefore they exclude refugees and asylum-seekers located in North Africa as this area falls to UNHCR’s CASWANAME Bureau, rather than its Africa Bureau. Together six North African countries (Algeria, Egypt, Libya, Mauritania, Morocco and Tunisia) host approximately 9,342 (5,700 in 2003) asylum-seekers.

5 This total is down from 2003 during which South Africa received 35,900. See, UNHCR, *Global Refugee Trends 2003* (Geneva, 15 June 2004).

6 See, e.g., Statement by E. Feller, Director of Department of International Protection, UNHCR to Regional Parliamentary Conference on Refugees in Africa, Cotonou, Benin, 1 June 2004.

7 H. Zlotnik, *International Migration in Africa: An Analysis Based on Estimates of the Migrant Stock* (Migration Information Source, 1 Sept. 2004, www.migrationinformation.org). Note that this figure may include asylum-seekers.

8 See Z.A. Lomo, *Presentation: The Struggle for Protection of the Rights of Refugees and IDPs in Africa: Making the Existing International Legal Regime Work* 18 *Berkely J. Int’l L* (2000) 268, 270.

9 A. Adepoju, *Changing Configurations of Migration in Africa* (Migration Information Source, 1 Sept. 2004, www.migrationinformation.org).

non-African destinations. In search of an often elusive dream, they become the secondary and tertiary movers of Africa. Over time, their secondary and subsequent movements begin to lose connections to their original reasons for flight, especially when many of their compatriots have already returned home.¹⁰

Why is there growing recourse to individual asylum assessments by host governments in Africa? This phenomenon can perhaps be partly explained as arising from UNHCR's efforts at encouraging States to adopt and implement their own national asylum laws. In addition, humanitarian fatigue in Africa has contributed to some degree to the increasing popularity of individual asylum procedures,¹¹ including "the costs – real or perceived – be they economic, political and/or social in nature – of hosting refugees for long periods."¹² When repatriation efforts have come to an end and there are still some individuals and families refusing to return home, individual status determination may be undertaken as a means of either encouraging them to return home or to verify their continuing need for international protection. The phenomenon of mixed migration flows described above has also encouraged States to engage in individual assessments in order to distinguish between individuals seeking protection from those using asylum systems for non-refugee-related purposes.

In some contexts, being granted status on an individual basis is crucial as it can be directly linked to accessing humanitarian assistance, residence or work permits, identity documentation, or resettlement.¹³ In countries which have both city and camp refugee populations, the former are more likely to be subjected to individual assessments than the latter as this population is generally granted group status. The Lawyers Committee for Human Rights (now Human Rights First) record in a 1995 report that collective determination may carry with it serious restrictions on a refugee's rights.¹⁴ There is not always a clear (or perhaps

10 See, further, *NGO Background Paper on the Refugee and Migration Interface*, co-authored by Human Rights Watch, International Catholic Migration Commission, World Council of Churches, and consultation with other NGOS, presented to UNHCR's Global Consultations on International Protection, Geneva, 28–29 June 2001.

11 B. Rutinwa, *The End of Asylum? The Changing Nature of Refugee Policies in Africa*, New Issues in Refugee Research: Working Paper No. 5, UNHCR (May 1999); J. Crisp, *Africa's Refugees: Patterns, Problems and Challenges*, New Issues in Refugee Research: Working Paper No. 28, UNHCR (Aug. 2000).

12 Statement by E. Feller, Director of Department of International Protection, UNHCR to Regional Parliamentary Conference on Refugees in Africa, *supra* note 6. See also Conclusions and Recommendations of the Consultative Meeting between the African Commission on Human and Peoples' Rights and the UNHCR, Addis Ababa, 20 & 21 Mar. 2003, Conclusion para. 6.

13 In 2004, the main nationalities benefiting from resettlement included Liberia (5610), Sudan (5050), Somalia (4870), Ethiopia (1490), and Democratic Republic of Congo (1290). Of the top ten countries facilitating resettlement departures, three were in Africa (Kenya (5640), Côte d'Ivoire (4480) and Egypt (4110)). See, UNHCR, *Global Refugee Trends 2004* (Geneva, 17 June 2005).

14 Lawyers Committee for Human Rights, *African Exodus: Refugee Crisis, Human Rights and the 1969 OAU Convention* (1995), 29. LCHR argues that collective status may restrict freedom of movement rights outside of designated rural or camp settlements, including that refugees may face arrest or detention if they leave such areas. See similar complaint raised in the context of South Africa, A. Tuepker, *On the Threshold of Africa: OAU and UN Definitions in South African Asylum Practice*, 15 J. Ref. Studies (2002) 409, 412.

public) explanation for this difference in treatment. It occurs even when the two groups of persons are from the same country of origin, and even from the same ethnic or religious communities. In fact, it can give rise to a number of unfair anomalies. As city dwellers are more likely to be subjected to individual status assessments, they may also be more likely to have access to resettlement opportunities. Western countries participating in resettlement schemes insist that cases be individually assessed and given the increasing pressure on UNHCR Offices to fill resettlement quotas, it is not unusual for those persons knocking at the doors of the main office each day to be considered for resettlement before those in the camps, which may be located many miles away and without permanent staff qualified in resettlement processing. The resource-intensive nature of individual processing can also have the effect of diverting resources away from protection-related activities in the camps. Added to this situation is the fact that many host countries insist on individual assessments of urban dwellers, not for the purpose of accessing humanitarian assistance, but as a deterrent against leaving the camps. This policy is sometimes accompanied by reduced humanitarian assistance to city dwellers in order to encourage them to stay in, or relocate to, the camps. Another potential distortion to this picture is one based on gender. As young males are more likely than women to be mobile, due to a range of factors, including family responsibilities, special dangers facing women travellers, or cultural prohibitions on women travelling alone, the former are more likely to find themselves in countries of secondary or tertiary refuge or in urban centres where individual assessments are carried out.

Although some commentators have questioned whether “an overly legalistic approach would be as artificial as it is antithetical to the OAU’s Convention’s humanitarian tone”,¹⁵ individual assessments are set to increase, rather than decrease, in the future. In recognising that asylum assessments in Africa are frequently conducted with limited resources and training, and that neither the UNHCR nor the African Union has provided substantive interpretative guidance on the terms of the OAU Convention, this article hopes to contribute to filling this gap by offering some insights into the difficulties and complexities of asylum determinations in Africa. In fact, there is a dearth of intensive scrutiny of the individual terms of the OAU Convention.

This article is divided into three main parts. The first part of this article identifies the historically divergent origins of the two relevant refugee conventions, namely the OAU Convention and the *1951 United Nations Convention relating to the Status of Refugees*¹⁶ (“1951 Convention”) and/or its *1967 Protocol*.¹⁷ While it traces over what could be described as old ground, it is important to repeat the main debates here, not only in order to place the treaties in context, but also to be able to make sense of some of the limitations and/or assumptions facing decision-

15 M.B. Rankin, *Extending the Limits or Narrowing the Scope? Deconstructing the OAU Refugee Definition Thirty Years On*, New Issues in Refugee Research: Working Paper No.113, UNHCR (April 2005), 11.

16 189 UNTS 137; entered into force 22 April 1954.

17 606 UNTS 267; entered into force 4 Oct. 1967.

makers in Africa today. I also try to reconcile diverging assumptions regarding the main impetus behind a separate treaty for Africa. The second part of this article takes an in-depth look at the definition of a “refugee” in Article 1(2) of the OAU Convention in order to understand its scope and breadth of application. In doing so, I seek to offer some clarity to the definition as well as to raise a range of interpretative approaches to several ambiguous terms, including re-thinking the objective and subjective components of the definition, and the meaning of “public order”. What distinguishes this article from others dealing with the same subject matter is that it breaks down the individual terms and analyses their application to today’s circumstances. Other literature tends to simply accept them as still applying to modern day crises in Africa, without actually investigating how they are interpreted in practice. I try to avoid generalised statements as to the broad applicability or generosity of the OAU Convention, which is the mainstay of most articles dealing with the AU Convention to date.¹⁸ The third part briefly discusses the continuing relevance of the definition of a “refugee” contained in the 1951 Convention for refugees in Africa. I highlight a range of new and evolving interpretations that have developed in response to the types of cases emerging since the 1980s, and suggest why it remains an important protection tool for African asylum-seekers.

II. HISTORICAL BACKGROUND

The 1951 Convention formed part of the United Nations’ response to the mass exodus of refugees fleeing Falangist, Quisling and Nazi regimes in Europe during and after the Second World War. The original definition elaborated in Article 1A(2) of the Convention reflected this specific set of circumstances, yet it did not depart in any significant way from earlier pre-World War II formulations. It was limited geographically to European refugees and temporally to events surrounding World War II. Although the Second World War was also fought on the African continent, the protection regime that was introduced in response did not reach its borders and was wholly limited to the European theatre. In view of the fact that the issue of forced displacement did not start or end with the Second World War and had still not been fully resolved by 1967, a Protocol to the 1951 Convention was negotiated, removing both the geographical and temporal restrictions and thereby enlarging its scope of application to refugees fleeing countries in Africa and elsewhere, as well as from events unrelated to the Second World War. Not all countries have accepted these amendments however. Apart from the removal of these restrictions, however, the substance of the refugee definition remained unchanged.

At the same time as the UN was debating an enlargement of the international refugee protection regime beyond the frontiers of Europe, with African States

18 This article does not address the grounds for excluding (as opposed to including) persons from refugee status. It also does not look at the accepted requirement that one needs to be outside one’s country of origin or nationality to claim refugee status.

actively pushing for such amendments,¹⁹ the OAU, the predecessor organisation to the African Union, was engaging in a parallel dialogue, culminating in the Convention of 1969. The 1960s had witnessed the beginning of the collapse of colonial rule in Africa and the pursuit of self-determination by many colonies. Colonial wars that ravaged the continent brought with them large-scale outflows of refugees into neighbouring countries. By 1965, there were some 850,000 refugees in Africa. By the end of the decade, it had risen to around one million.²⁰ “[V]irtually all independent countries in Southern Africa received waves of refugees from countries which were [-] struggling against racism, colonialism and apartheid.”²¹ It is commonly asserted that the Africa-specific definition in Article 1(2) of the OAU Convention was, therefore, introduced in direct response to sentiments that the 1951 Convention definition neither reflected the African experience, nor adequately encompassed the range of refugees to whom African Governments wished to extend protection.

Arboleda has stated that “[t]he general definitions of refugee status in the Statute of the UNHCR and the 1951 Convention have been rendered obsolete by evolving realities of the third world.”²² Maluwa has considered that these instruments were “ill-suited to respond to the unique problems posed by refugee movements and forced migrations in other [non-European] parts of the world ...”²³ While many commentators follow this general understanding, there continues to be some dispute surrounding the real impetus behind the emergence of a separate definition. Okoth-Obbo suggests that the so-called “irrelevance” of the 1951 Convention to Africa is a “gross overstatement and misrepresentation of the true position”²⁴ and that these understandings are not supported by the historical record.²⁵ He argues that the passage of the 1967 Protocol called into question the OAU’s own efforts at creating a new regional treaty and it was thus forced to shift its position.²⁶ It is arguable that this shift in position positively contributed to a re-evaluation of the application of the 1951 Convention and 1967 Protocol definition to African refugee problems. Had it been otherwise, the OAU Convention might simply have endorsed the 1951 Convention definition minus its geographical and temporal limitations.²⁷ Rankin, in a very recent paper, identifies that at the base

19 E. Arboleda, *Refugee Definition in Africa and Latin America: The Lessons of Pragmatism*, 3 *IJRL* (1991) 185, 193.

20 UNHCR, *The State of the World’s Refugees 2000: Fifty Years of Humanitarian Action*, Chapter 2: Decolonisation in Africa, 1 Jan. 2000, 52.

21 Rutinwa, *supra* note 11, at 5.

22 Arboleda, *supra* note 19, at 188.

23 T. Maluwa, *The Refugee Problem and the Quest for Peace and Security in Southern Africa*, 7 *IJRL* (1995) 653, 661. See also J. Oloka-Onyango, *Human Rights, The OAU Convention and the Refugee Crisis in Africa: Forty Years After Geneva*, 3 *IJRL* (1991) 453, 454.

24 G. Okoth-Obbo, *Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa*, 20(1) *Refugee Survey Quarterly* (2001) 79, 109. See also A. Tuepker, *supra* note 14.

25 *Ibid.*, at 111–112.

26 *Ibid.*, at 10. See also for an overview of the origins of the OAU Convention, K. Elmadmad, *Asile et Réfugiés dans les Pays Afro-Arabes*, Editions EDDIF, Morocco (2002) at 116–121.

27 See Okoth-Obbo, *supra* note 24, at 110, referring to an early draft of the OAU Convention.

of the OAU Convention was a desire to balance traditional hospitality with the need to ensure security and peaceful relations among African States, with security being at its core.²⁸

Whatever the reasons behind the inclusion of a new Africa-specific definition, it has extended protection to persons escaping “external aggression, occupation, foreign domination or events seriously disturbing public order”, grounds not included expressly in the 1951 Convention definition. Oloko-Onyango describes the definition as “the most innovative and advanced aspect of the Convention.”²⁹ Similarly, in 1984, the Organization of American States (“OAS”) followed Africa’s lead and tailored its own region-specific declaration. The definition of a “refugee” incorporated therein enlarged the 1951 Convention definition to include persons fleeing “because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.”³⁰ In contrast to the Cartagena Declaration that is non-binding, although it arguably confirms customary approaches to defining refugees, the OAU Convention imposes regional norms on its States parties.³¹ These regional instruments have had a significant influence on the development of so-called complementary or subsidiary forms of protection in other parts of the world, recognising that there are many persons who are in need of humanitarian protection but whose claims fall short of the 1951 Convention definition.

Even though so much attention was paid to the unique African context, the 1951 Convention formula was retained in Article 1(1) of the OAU Convention, partly as a result of the heavy involvement of UNHCR in the OAU’s deliberations.³² The 1951 Convention was also recognised in the Preamble as “constitut[ing] the basic and universal instrument relating to the status of refugees ...”³³ The OAU Convention further noted that “close and continuous collaboration between the [OAU] and the [UNHCR] is required to solve the refugee problems of Africa.”³⁴ Thus, even though a broader definition was enshrined, the old definition was copied minus its geographical and temporal limitations. There was, however, little discussion as to its applicability in post-colonial Africa. Interestingly, twenty-five years after the creation of the OAU Convention and twenty years after its entry into force, the OAU/UNHCR Joint Symposium in 1994 emphasised the OAU Convention as being the “centre” of the international refugee protection regime on the continent, only fleetingly referring to the 1951

28 Rankin, *supra* note 15, at 2.

29 Oloko-Onyango, *supra* note 23, at 455.

30 Cartagena Declaration on Refugees 1984, adopted by the Colloquium of the International Protection of Refugees in Central America, Mexico and Panama, Part III, para. 3.

31 See also E. Arboleda, *The Cartagena Declaration of 1984 and its Similarities to the 1969 OAU Convention – A Comparative Perspective*, (1995) Special Issue Int’l J. Ref. L. 87.

32 UNHCR, *The State of the World’s Refugees 2000*, *supra* note 16, at 56. See, also, Arboleda, *supra* note 19, at 193.

33 Preambular para. 9, OAU Convention.

34 *Ibid.* para. 11.

Convention.³⁵ Almost reversing the original position, the Thirtieth Anniversary saw the OAU Convention characterised as the “cornerstone for refugee protection [in Africa] and as the effective regional complement” to the 1951 Convention.³⁶ This seems in stark contrast to Article 12(3) of the 1981 African Charter on Human and Peoples’ Rights (“Banjul Charter”)³⁷ which grants the “... right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and *international* conventions.” (my emphasis) Given that the Banjul Charter post-dates the OAU Convention, it is surprising that it did not refer to any relevant regional treaties at all, including omitting the OAU Convention dealing with refugees.

III. INTERPRETATIVE INSIGHTS INTO THE OAU CONVENTION DEFINITION OF A “REFUGEE”

1. Objective Criteria

Article 1(2) of the OAU Convention is the first refugee definition of its kind to steer away from persecutory conduct towards more generalised or so-called “objectively” identifiable forms of violence. The OAU definition acknowledges that fundamental forms of abuse may occur not only as a result of the calculated acts of the government of the refugee’s State of origin, but also as a result of that government’s loss of authority due to external aggression, occupation, or foreign aggression.³⁸ The definition provides:

Any person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or in the whole of his[or her] country of origin or nationality, was compelled to leave his [or her] place of habitual residence in order to seek refuge in another place outside his [or her] country of origin or nationality.

Widely endorsed as a “step forward”³⁹ in terms of expanding the concept of “refugee-hood” and refugee protection, its specific terms are not beyond ambiguity. While the definition may seem perfectly functional in cases of mass influx where its humanitarian spirit governs its application, it is rather more complex when trying to “fit” its terms to particular factual scenarios arising in African refugee claims.

35 The Addis Ababa Document on Refugees and Forced Population Displacements in Africa, OAU/ UNHCR Symposium, 8–10 Sept. 1994.

36 Comprehensive Implementation Plan, UN doc. CONF.P/OAU30TH/REPORT – Annex II, Part One A.I.1, in 20(1) Refugee Survey Quarterly (2001) 31, 32.

37 OAU Doc. CAB/LEG/67/3, rev. 5, 21 ILM 58 (1982), Adopted 27 June 1981; entered into force 21 Oct. 1986.

38 J.C. Hathaway, *The Development of the Refugee Definition in International Law*, in J. C. Hathaway, *The Law of Refugee Status*, Butterworths, Canada (1991) 16–21.

39 See, e.g., P. Nobel, *Refugees, Law, and Development in Africa*, 3 Mich. YB Legal Stud. (1982) 255, 262; Arboleda, *supra* note 19; Maluwa, *supra* note 23; Oloka-Onyango, *supra* note 23.

(a) “owing to ... external aggression”

None of the terms incorporated within Article 1(2) have been defined within the OAU Convention itself and thus recourse to other international instruments is the logical starting point as a basis for understanding them. Prohibitions against “aggression” are of celebrated status within the international system. The first enshrined purpose of the 1945 UN Charter in Article 1(1) is that the Organisation should ensure the “suppression of acts of aggression or other breaches of the peace.” In spite of its common usage and its peremptory status, however, the term is not readily defined. It is not defined by the UN Charter, apart from its later reference to “the threat or use of force against the territorial integrity or political independence of any state” in Article 2(4). In 1970, the UN General Assembly specified in detail a number of related obligations or duties upon States in Resolution 2625 (XXV). Notably,

... Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force ...

...

Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.⁴⁰

While this resolution was not couched in terms of interpreting Article 2(4) or “aggression”, the International Court of Justice in the *Nicaragua (Merits) Case*⁴¹ referred to these duties in clarifying the concept of the former. It found that the “arming and training of the *contras* [by the United States] can certainly be said to involve the threat or use of force against Nicaragua.”⁴² Military manoeuvres near the Nicaraguan border were not, however, considered to have infringed the principle of the use of force⁴³ and the Court sought to distinguish between “armed attack” and “mere frontier incident”,⁴⁴ the former presumably amounting to an act of force and not the latter, although the Court did not elaborate further.

40 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN GA res. 2625 (XXV), 24 Oct. 1970. The resolution was adopted by the GA without a vote. See, also, S. Jacquemet, *Under What Circumstances Can a Person Who Has Taken an Active Part in the Hostilities of an International or a Non-International Armed Conflict Become an Asylum Seeker?*, Legal and Protection Policy Series, UN Doc. PPLA/2004/01, UNHCR (June 2004).

41 *Military and Paramilitary Activities (Nicaragua v USA)*, 1986 ICJ Reports 14.

42 *Ibid.*, para. 229.

43 *Ibid.*, para. 228.

44 *Ibid.*, para. 195.

A Special Committee of the General Assembly on the question of aggression was set up in 1967 and adopted a definition by consensus in 1974. It provides:

Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations as set out in this definition.⁴⁵

Although it is the most recent and the most widely, albeit not universally, accepted, this definition does not though extend beyond that already understood under the UN Charter.⁴⁶ Noting that it pre-dates the 1969 OAU Convention, it might well have been this interpretation that OAU Members States had in mind when drafting the new refugee definition.

The International Law Commission's 1961 Draft Code of Crimes Against Peace and Security of Mankind establishes the "crime of aggression" where an individual "actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State ..."⁴⁷ This is identically drafted to the crime of peace in the 1945 London Charter of the International Military Tribunal.⁴⁸ These documents are, however, largely unhelpful as they identify associated crimes, but do not define the term itself. Similarly, the 1998 Statute of the International Criminal Court⁴⁹ has introduced the crime of aggression, although its States parties have yet to agree a definition.⁵⁰

The absence of any agreed definition of "aggression" in international law is therefore problematic, but not fatal in terms of refugee law which is governed by its humanitarian object and purpose.⁵¹ Clearly, the term "external aggression" in Article 1(2) of the OAU Convention would cover "international conflict" or "foreign invasion." Due to its lack of specificity, it also arguably encompasses not only wars of aggression but also acts of aggression short of war,⁵² although perhaps not mere frontier incidents. The term would not though extend to wholly civil conflicts, yet it may apply where such conflicts are "fuelled by outside involvement or [-] have spilled over into neighbouring states."⁵³ This approach would coincide with the general position at international law that States have a "duty to refrain from organising or encouraging the organisation of irregular

45 GA Res. 3314 (XXIX) *Definition of Aggression*, 29 GAOR, Supp. 31 (A/9631) at 142.

46 Y. Dinstein, *War, Aggression and Self-Defence*, Cambridge University Press, 3rd ed. (2001) 115.

47 Art. 16.

48 See also UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, UN Doc. HCR/GIP/03/05, 4 Sept. 2003 and *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 Sept. 2003.

49 UN Doc. A/CONF.183/9. 2187 UNTS 3. Adopted on 17 July 1998; entered into force 1 July 2002.

50 Art. 5(2).

51 Art. 31, 1969 Vienna Convention on the Law of Treaties ('VCLT'), 1155 UNTS 331. Adopted on 22 May 1979; entered into force on 27 Jan. 1980.

52 See Dinstein, *supra* note 46, at 114.

53 C. Gray, *International Law and the Use of Force*, Oxford University Press (2000), 51.

forces or armed bands, including mercenaries, for incursion into the territory of another State.”⁵⁴

What seems more problematic than, yet related to, the loose understanding of the term “aggression” is the fact that “[e]xpress findings of aggression (or of aggressive acts) are extremely unusual.”⁵⁵ “[I]n fact large-scale inter-state conflicts have been exceptional since 1945; most inter-state conflicts have been limited to border actions.”⁵⁶ In addition, the Security Council and the General Assembly have condemned very few situations for aggression. Gray refers to Southern Rhodesia after its unilateral declaration of independence and South Africa during apartheid and its occupation of Namibia⁵⁷ as only three examples drawn from Africa. Rwanda’s presence in the Democratic Republic of Congo (“DRC”) might be added as a third by virtue of Security Council Resolution 1304/2000, although Rwanda maintains that it was acting in self-defence to flush out Interhamwe and other rebel insurgents operating in Congolese territory. However, there is also no mention of “aggression” in the resolution. Ironically, refugees fleeing this conflict are likely to seek asylum within Rwanda itself, the so-called “aggressor” State. The political ramifications of this make the application of this term to such refugees unlikely. Similarly, it might be argued that the alleged support for and harbouring of rebels in neighbouring countries in West Africa (particularly Liberia, Guinea and Sierra Leone), in addition to cross-border attacks, could equally fall within this term.⁵⁸

While it is acknowledged that incorporating “external aggression” as the first of the new grounds to refugee status under the expanded definition in Article 1(2) of the OAU Convention was responsive to the situation in Africa in 1969, it is to a large extent outdated, being surpassed by current events that principally revolve around internal troubles and rarely invoke international conflict. Moreover, the political nature of the term means that receiving States may be reluctant to use it, even in the context of refugee protection, the granting of which is not to be seen as an unfriendly act.⁵⁹ Any politicisation of its application would undermine its effectiveness as a tool of refugee protection. It may not, therefore, be as “objective” an element as first thought. Having said this, however, it is acknowledged that it has served millions of refugees in the past and may be similarly applicable in the future. And, in order to secure its modern relevance it must be interpreted in its widest sense to apply also to events fuelled or supported from outside.

54 General Assembly Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, *supra* note 40.

55 Gray, *supra* note 53, at 17.

56 *Ibid.*, at 51.

57 *Ibid.*, at 17.

58 See, e.g. International Crisis Group, *Liberia: The Key to Ending Regional Instability*, Africa Report No. 43, Freetown/Brussels, 24 April 2004.

59 See, e.g., Art. 2(2), OAU Convention.

(b) "owing to ... occupation"

There is some overlap between the second and third terms in the OAU definition of "occupation" and "foreign domination". According to Fleck, "[b]elligerent occupation is a form of foreign domination"⁶⁰, although the latter is not necessarily limited to occupation. As with Article 1(2) as a whole, these terms were inserted in response to the ongoing problems of colonial occupation and domination on the continent.⁶¹ Like "external aggression", "occupation" is not defined in the OAU Convention, although it carries legal significance in international law.⁶² According to Article 42 of the Hague Regulations of 18 October 1907 concerning the Laws and Customs of War on Land, a territory is considered to be "occupied" when it is "actually placed under the authority of the hostile army". Paragraph 2 of the same article adds that, "The occupation extends only to the territory where such authority has been established and can be exercised." In the context of a non-international conflict, the recapture of control by government forces of territory held by rebels "does not constitute "occupation" but the reestablishment of control which had been lost by government."⁶³ Thus, on its face, "occupation" is not applied in the context of non-international armed conflicts. While the term is rarely applied in modern day African conflicts, it is not obsolete. Could the term have been applied, for example, in the context of persons fleeing North and South Kivu provinces in the DRC during the late 1990s and early 2000s, seeking protection from "occupation" by Rwandan and Ugandan governments?⁶⁴ As in the case of "aggression" (see above), such persons typically sought refuge on the territories of Rwanda and/or Uganda, the supposed "occupiers" and/or "aggressors". This fact makes the terms politically charged in such contexts, as well as very unlikely to be applied in practice.

(c) "owing to ... foreign domination"

"Foreign domination" does not carry a legal meaning *per se*, but rather refers to a factual situation in which a foreign power dominates or controls the territory of another State. It appears to be used interchangeably with colonial domination, foreign intervention and occupation. At a minimum, it is associated with international or foreign control, thus restricting its application to situations of domination by outsiders, not insiders. This would tend to eliminate its application to authority exercised by local landlords, guerrilla leaders or internal rebel forces, unless there was some correlative element of foreign control or influence. While occupation and foreign domination may appear part and parcel of the same

60 D. Fleck, *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press (1999) 242.

61 Maluwa, *supra* note 23, at 662.

62 See, Fleck, *supra* note 60, at 243 and F. Kalshoven, *Constraints on the Waging of War*, International Committee of the Red Cross, Geneva (1987) 55–58.

63 Fleck, *supra* note 60, at 242.

64 Similarly, individuals fleeing the Western Sahara under alleged "occupation" by Morocco might be eligible to seek protection under this ground. See, e.g., Human Rights Watch, *Keeping it Secret – the United Nations Operation in the Western Sahara*, Vol. 7, No. 7, 1 Oct. 1995.

act, the former has attained a particular meaning in international law, leaving the latter perhaps to be interpreted more broadly. How broadly could or should this term be interpreted? Does it cover the level of control exercised by the International Monetary Fund (“IMF”), the World Bank (“WB”), or foreign aid donors over African economies?⁶⁵ What about the imposition of economic sanctions by the Security Council that result in impoverishment of parts of the population and their subsequent flight? Could the term include the situation where puppet governments exist because of political and economical control of foreign States?

The Preamble to the Charter of the OAU states as one of its principal aims “... to safeguard and consolidate the hard-won independence as well as the sovereignty and territorial integrity, of our States, and to fight against *neo-colonialism* in all its forms,”⁶⁶ (emphasis added). The OAU was established with “its primary aim ... to “decolonize” the remaining bastions of white rule in Southern Rhodesia, South Africa, Mozambique and Angola”⁶⁷, but it is not temporally restricted to this period. The drafters of the OAU Convention did not limit its application to “colonial domination”, even though that was clearly one of the reasons for the establishment of the OAU itself. Interpreting “foreign domination” to include UN-imposed economic sanctions or IMF/WB strategies would perhaps be an unpopular, if not politically imprudent, approach, but there does not seem anything to stop decision-makers from doing so. Not unlike the non-aggressive face of asylum generally, granting asylum under the OAU Convention should not be considered as a basis for friction among States.⁶⁸ Thus, it may be open to decision-makers to interpret “foreign domination” in these new and evolving ways.

(d) “owing to ... events seriously disturbing public order”

Of the four grounds to refugee status in Article 1(2) of the OAU Convention, the last is potentially the most flexible as well as the most applicable to the types of refugee situations facing Africa today, although it is not without ambiguity, nor without its opponents. This phrase evokes a whole series of issues:

- Does it encompass events of a non-international character?
- What is meant by “disruption to public order”?
- What would qualify as “serious”?

Above all, the scope of the phrase relates more to how far States are prepared to extend the term, given that it could arguably cover a whole range of situations not necessarily foreseen or planned for by the drafters at the time, rather than what can legalistically be interpreted to fall within it. For example, are terrorist attacks covered? Does it apply to human rights violations, including those of an

65 See, e.g., S. Castles, *Environmental Change and Forced Migration: Making Sense of the Debate*, New Issues in Refugee Research: Working Paper No. 70, UNHCR (Oct. 2002) 11.

66 Preamble to the Charter of the Organisation of African Unity, 25 May 1963.

67 1963: *African states unite against white rule*, 25 May 1963, BBC, <http://news.bbc.co.uk>.

68 See, Preambles to the OAU Convention and the 1951 Convention and Art. 2(2), OAU Convention.

economic nature? What about environmental disasters? These issues will be taken in turn below.

(i) Does the phrase encompass events of a non-international character? Was this its purpose?

The main difficulty with the ground derives ironically from its greatest strength: its vagueness. It is, therefore, arguable that it can be either restrictively or liberally interpreted. Applying the interpretative rule, *noscitur a sociis*, in which the meaning of words in a law are to be interpreted in the context of surrounding words, the phrase ought to be limited to events that are connected in some way, or that are of the same type, as “external aggression, occupation or foreign domination”. If the shared characteristic of the preceding three grounds to refugee status is taken as being their international character, the argument would proceed that the phrase should not be read as applying to each and every event that seriously disturbs public order, but only when such circumstances are related to events of an international character or which have an international connection. There is support for this approach if one takes into account the intentions of the drafters and the overall design of the Convention to protect refugees suffering the scourges of colonialism.⁶⁹ However, while this is perhaps the predominant understanding of events occurring in Africa during the decolonisation period, an alternative view is that colonial governments had the effect of removing the sovereignty of the pre-colonial State and, therefore, the conflict that led to the end of that regime could only be described as “internal” in character *de jure*, rather than international.⁷⁰ Moreover, it is also plausible to argue that the interpretative rule should be applied to cover events that share the fact that there is a serious disruption to society that threatens the lives and freedoms of human beings (rather than the international character of the events), thereby encompassing non-international events. This latter approach would assert that even though the principal intention of the drafters was to protect persons against colonial excesses, a correlative (and perhaps inseparable) objective was to protect persons fleeing incursions on their freedoms, threats to their lives, as well as general instability. Thus, the accepted approach may ultimately rest on the choice or emphasis given to a particular object and purpose of the text, both of those put forward above having some validity. In addition, there is no explicit language in Article 1(2) to suggest that the disruption needs to arise from outside the territory, in addition to which the term “public order” is most commonly applied in terms of internal security or stability of society.

In addition to the above analysis, there is another way to interpret the ground and that is as a “catch-all” category applicable to any situation in which there is a serious disruption of public order. A literal interpretation of the phrase lends support to this interpretation. Its only misgiving is that it would appear to be in conflict with UNHCR’s interpretative methodology that it applies to the provi-

⁶⁹ Art. 31(1), VCLT.

⁷⁰ See Rankin, *supra* note 15, at 15.

sions of the 1951 Convention, and that it would presumably assert against the OAU Convention too. In particular, UNHCR has cautioned against reading the phrase “membership of a particular social group” in Article 1A(2) of the 1951 Convention as a catch-all category so as to render the other four grounds superfluous.⁷¹ And this has been the general approach of leading national asylum decisions.⁷² This may similarly be the effect of a broad interpretation of the final ground under the OAU Convention. At first glance, therefore, the phrase presents a quandary, although the practice of States has shown a willingness to protect persons fleeing internal, as well as external, disturbances.

(ii) What is meant by “public order”?

Getting to the bottom of the meaning of the term “public order” as applied within the OAU Convention is no mean feat, in spite of its inclusion in a range of other international and regional human rights and refugee law instruments, not to mention national laws. It may be worthwhile to draw upon the approach under the 1951 Convention where the term “public order” appears three times. According to Paul Weis in his commentary on the 1951 Convention, the term “public order” in Article 2 of that Convention (dealing with general legal obligations of refugees to their host country) does not correspond to the meaning of that term in Anglo-Saxon law, but rather to the broader term “*ordre public*” in French law; that is, “Both threats to the internal and external security are meant, whether covered by the Criminal Code or not”.⁷³ According to Bewes writing in 1921, the phrase was invented in the Napoleon Code and is similar to the idea in English law of “public policy”,⁷⁴ or perhaps even, “public interest.” He notes that “boni mores” (morality) are “evidently” included within the conception of public order.⁷⁵ Quoting from an earlier treatise, he averts the reader to the fact that public order is all things “essential to the existence of society ...”, listing social, political, economic, moral, and religious order.⁷⁶ Property rights infringements, public demonstrations, and minor crimes for civil disobedience, come to mind as falling with the term.⁷⁷ The point Bewes makes is that public order may be of infinite variety.⁷⁸

The inclusion of “public order” in Article 2 of the 1951 Convention was at the

71 UNHCR, *Guidelines on International Protection: “Membership of a Particular Social Group” within the context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, UN doc. HCR/GIP/02/02, 7 May 2002, para. 2.

72 For an overview of cases, see T.A. Aleinikoff, *Protected Characteristics and Social Perceptions: An Analysis of the Meaning of “Membership of a Particular Social Group”*, in E. Feller, V. Türk & F. Nicholson, *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, Cambridge University Press (2003) 263.

73 P. Weis, *The Refugee Convention, 1951*, Cambridge International Documents Series, vol. 7, 38.

74 W.A. Bewes, *Public Order (Ordre Public)*, 37 *Law Qry Rev.* (1921) 315, 315.

75 *Ibid*, at 315.

76 G. Baudry-Lacantiniere and M. Hougues-Fourcade, *Droit Civil* (no date given), in W.A. Bewes, *supra* note 74, at 318.

77 See O. Field and A. Edwards, *Study on Alternatives to Detention of Asylum Seekers and Refugees*, UNHCR, Legal and Protection Policy Series (2005) [on file with the writer].

78 Bewes, *supra* note 74, at 322.

prompting of the French delegate to the Conference of Plenipotentiaries to restrict the political activities of refugees.⁷⁹ The term “public order” also reappears in Articles 28 (issuance of travel documents unless compelling reasons of national security or public order otherwise require) and 32 (expulsion). In relation to the former, the main concern of the drafters was to prevent refugees from travelling who seek to escape prosecution or punishment for a criminal offence, or where the refugee is suspected of travelling in order to engage in criminal or espionage activities.⁸⁰ Under Article 32, “national security and public order” are listed as exceptions to the general prohibition on expulsion, but the *travaux préparatoires* indicates that they do not include “social causes such as indigence, illness or disability.”⁸¹ This does not necessarily mean that such factors could not be public order issues, but simply that the drafters did not intend for such social issues to revoke a refugee’s right not to be expelled. According to the debate at the time of drafting, the term “public order” in this sense did include serious, as opposed to minor, criminal offences.⁸² While national security and public order are often invoked simultaneously, “public order” also relates to localised insecurity or chaos in addition.

Apart from the obvious inclusion of “public order” in relation to Article 1(2) of the OAU Convention, the term also appears in relation to the prohibition on subversive activities that every refugee must conform to the laws and regulations in the country of refuge, as well as to measures taken for the maintenance of public order.⁸³ It further appears in relation to reasons for not issuing travel documents.⁸⁴ But there is limited, if any, guidance on its meaning in any of these provisions. Similarly, its inclusion in the Cartagena Declaration as the last in a series of terms indicates that it may have been intended as a catch-all category after all, but no specific meaning can be gleaned from the term.

“Public order” is also in frequent usage in relation to acceptable limitations to specific human rights provisions under the International Covenant on Civil and Political Rights 1966 (“ICCPR”)⁸⁵. For example, the rights to freedom of movement, religion, expression, peaceful assembly, and association, may be subjected to restrictions that are “provided by law, are necessary to protect ... *public order (ordre public)* ...”, and are consistent with other rights ...⁸⁶ (my emphasis). There is very little general guidance on the meaning of “public order” under these provisions however.⁸⁷ Few cases have raised the “public order”

79 Weis, *supra* note 73, at 36–39.

80 *Ibid.*, at 266.

81 *Ibid.*, at 322.

82 *Ibid.*

83 Art. 3, OAU Convention.

84 *Ibid.*, Art. 6.

85 GA res. 2200A (XXI), 16 Dec. 1966; entered into force 23 Mar. 1976.

86 This has been paraphrased as there are slight variations for each right. See, Arts. 12, 18, 19, 21, and 22 of the ICCPR, respectively.

87 See, e.g., Human Rights Committee General Comment No. 27 on Freedom of Movement, UN doc. CCPR/C/21/Rev.1/Add.9, 2 Nov. 1999; GC No. 22 on the right to freedom of thought, conscience or religion, UN doc. CCPR/C/21/Rev.1/Add.4, 30 July 1993; GC No. 10 on Freedom of expression, 29 June 1983 (no UN number).

limitation directly. In a 1992 case it was held by the Human Rights Committee that refusing to issue a passport to a military conscript was “necessary for the protection of national security and public order.”⁸⁸ “Likelihood of absconding” and “lack of cooperation” have been accepted as factors that may justify detention in an individual case, presumably on public order grounds.⁸⁹ In another case, the Human Rights Committee found that “the regulation of surnames and the change thereof was eminently a matter of public order” in the context of Article 18.⁹⁰ So, we can add administrative order as forming part of public order. “Public order” limitations on Article 19 rights have included prohibitions on speech which may incite crime, violence, or mass panic, as well as allowing prohibition on mass broadcasting without a licence.⁹¹

Overall, it appears that the meaning given to “public order” will depend on the context or situation and limited help is provided by these other applications, except to note that they involved administrative, social, political, and moral order. Joseph et al conclude in their review of the limitations in respect of Article 12 that common measures such as traffic safety rules, reasonable restrictions on access to nature reserves or animal sanctuaries, earthquake or avalanche zones, quarantine zones, or areas of civil unrest, would most likely constitute permissible restrictions on freedom of movement. While the authors do not state specifically whether these would come under the “public order” ground of the many limitations, it seems like the most applicable given the examples.⁹²

(iii) What would qualify as “serious”?

The level of disruption must be “serious” for it to justify the granting of refugee status under the OAU Convention. Circumstances giving rise to a “state of emergency” would therefore qualify, provided the state of emergency is legitimately and reasonably imposed.⁹³ Events that are prolonged, on a massive scale, or harmful to life, freedom or security, would most likely suffice, while random, one-off, small-scale events that do not threaten life, freedom or security, would not. Violent civil conflicts would satisfy the ground, whereas a one-off protest resulting in some small-scale looting and/or firebombing would probably not. The events need to disrupt public order, not private individuals alone, although should an individual or group be targeted by a one-off event, he or she may individually apply for asylum under Article 1(1) of the OAU Convention or under Article 1A(2) of the 1951 Convention. The use of the plural term “events” further indicates that more than an one-off incident was intended. Rather, a pattern of actions or action of a systematic or cumulative nature would be more likely to

88 *Peltonen v Finland*, HRC 492/1992, para. 8.4.

89 See *A v Australia*, HRC 560/1993, para. 9.4. See Field and Edwards, *supra* note 77.

90 *Cieriel and Aurik v The Netherlands*, HRC 453/1991, para. 6.1.

91 See S. Joseph, J. Schultz and M. Castan (eds.), *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentar*(, Oxford University Press (2004) 396.

92 *Ibid*, at 364.

93 For overview of states of emergency, see Human Rights Committee General Comment No. 29 (2001) on States of Emergency (Article 4), UN doc. CCPR/C/21/Rev.1/Add.11, 31 Aug. 2001.

warrant protection. At a minimum, therefore, civil conflicts, coups d'états, militia or rebel group insurgencies, and other similar actions, would satisfy the term and the term has been regularly applied with these acts in mind.

(iv) Terrorism

As Monica Kathina Juma and Peter Mwangi Kagwanja note, parts of Africa are both “a theatre and victim of terrorist activities.”⁹⁴ They mention Sudan and Somalia as perceived havens and sponsors of terrorism, to Kenya and Tanzania as targets of terrorist attacks, and Uganda as a country that has remained on high security alert.⁹⁵ Terrorist activities are well known on the African continent, most commonly within the context of armed conflict, but also outside this, such as the bombings of the US Embassies in Kenya and Tanzania in 1983. Even though there is no internationally agreed definition of “terrorism”,⁹⁶ it is the ramifications of such acts with which the OAU Convention is concerned. Whether the acts are labelled “terrorist” or not is irrelevant to the granting of refugee protection under the OAU Convention. The source of such an attack is also irrelevant, that is, whether it originates from outside or inside the territory, or whether it is civil terror or trans-national terror, or in fact, whether it emanates from a State or a non-State actor. The OAU Convention does not seek to apportion blame for the events in question, but rather seeks to grant protection to those caught within their path. Therefore, decision-makers need not become entangled in the debate over “freedom fighters” versus “terrorists”. In fact, in both these senses, we can see that the OAU Convention was particularly attuned to the problem of terror or cross-border terror.

Furthermore, this ground to refugee status under the OAU Convention is particularly relevant in the African context because it incorporates non-State actors within the law – there is nothing to suggest in the definition that the threat must emanate from the State. In fact, the drafters were also well aware of the significance of subversive or terrorist activities on their soil.⁹⁷ This observation also distinguishes the last ground from the first three grounds – that is, under international law, aggression, occupation and foreign domination can only be carried out by States.⁹⁸ In this way, fleeing State-sponsored terrorism may more appropriately be classified under one of the other grounds, while non-State terrorist attacks would fall to be considered under the last ground. Whether the terrorist attack gives rise to a claim to asylum will moreover depend on its

94 M.K. Juma and P.M. Kagwanja, *Securing Refuge from Terror: Refugee Protection in East Africa after September 11*, in N. Steiner, M. Gibney and G. Loescher (eds.), *Problems of Protection: The UNHCR, Refugees, and Human Rights*, Routledge, New York (2003) 225, 225.

95 *Ibid.*, 225.

96 See e.g., B. Saul, *Attempts to Define “Terrorism” in International Law*, (2005) *Neth. Int'l L. Rev.* 57–83; B. Saul, *Definition of “Terrorism” in the UN Security Council: 1985–2004*, 4 *Chinese J. Int'l L.* (2005) 141–166.

97 See preambular para. 5 and Art. 3 on the prohibition on subversive activities, including attacks on neighbouring States.

98 For a discussion on non-State actors under international law, see R. McCorquodale, *An Inclusive International Legal Order*, 17(3) *Leiden J. Int'l L.* (2004) 477.

seriousness. A single terrorist attack that temporarily disrupts public order would not generally be sufficiently serious to justify flight, whereas a series of attacks that disrupt public order would presumably suffice where a state of emergency could legitimately be imposed. The capacity of the State to respond would need to be taken into account.

(v) Widespread Human Rights Violations

Although there is no specific reference to human rights violations in the OAU Convention definition, they may, in reality, constitute or give rise to events that seriously disturb public order. In order to do so, such undermining of rights, I would argue, would in most cases need to be on an extensive or massive scale, rather than targeted at individual persons alone. Serious human rights violations may however be the catalyst for other activities, such as widespread protests, demonstrations, or strikes, which may in turn disrupt public order. In contrast to the AU Convention, the Cartagena Declaration refers to “massive violation of human rights” as a separate head of protection. Some might argue that the cue, therefore, ought to be taken from the Organisation of American States in limiting the recognition of human rights violations causing serious public disruption to those on a massive scale. While massive or widespread violations would clearly fall within this ground, the key criterion is that such abuses need to “seriously” disturb public order and hence, it may depend on the circumstances of each situation as to whether the term could include less widespread attacks, especially when such terms as “massive” or “widespread” are not readily quantifiable.

A recent article made reference to the non-derogable civil and political rights under the ICCPR as a basis for deciding if an individual or group could claim status under the final ground of the OAU Convention. Rankin suggests that the Human Rights Committee’s General Comment on States of Emergency⁹⁹ ought to be taken as the basis for identifying those rights from which a “serious disruption of public order” may arise – namely, non-derogable rights listed in Article 4 of the ICCPR.¹⁰⁰ This is in contrast to what I suggest above that the declaration of a state of emergency could be used as an indication that public order has been seriously disturbed. In contrast, Rankin limits her analysis to only civil and political norms of international human rights law. I believe that this thesis is problematic for at least three reasons. First, the rights listed in Article 4 are those from which a State cannot derogate at any time, regardless of any state of emergency. Rankin seems to be using these specific rights for another purpose entirely. She states that “the position taken here is that the violation of these rights on a sufficiently broad scale is an indication that public order has been seriously disturbed.”¹⁰¹ Contrastingly, I argue that such rights do not reflect the reason or impetus behind the declaring of a state of emergency, nor do they reflect when a situation “threatens

99 HRC GC No.29 (2001) on States of Emergency, UN doc. CCPR/C/21/Rev.1/Add.11, 31 Aug. 2001.

100 Rankin, *supra* note 15, at 19–20.

101 *Ibid*, at 20.

the life of the nation.” While I agree that the deprivation of such rights on a broad scale could give rise to “events that seriously disturb public order”, this would (a) depend on the circumstances and (b) be wholly unrelated to their listing as Article 4 non-derogable rights. Second, the drafters of the OAU Convention could not have had this type of analysis in mind at the time of drafting the treaty; otherwise their language would have certainly been more precise and limited to specific or peremptory civil and political norms of international law. Nor does it recognise the spirit in which the treaty was enacted. Third, it disputes the general United Nations” approach to international human rights law; that “All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.”¹⁰² What I am suggesting is that the ground should not be limited to any one category of rights, but should turn on whether public order has been disrupted to the requisite level.

This leads me to another important question in any discussion on the extent to which the violation of human rights necessitate flight and obligate governments to provide protection. Can the deprivation of economic rights fall within the OAU Convention definition of a “refugee”? That is, does poverty-driven movement give rise to refugee status under the OAU Convention? The 1951 Convention definition has been long criticised for focusing on abuses of civil and political rights, rather than socio-economic ones.¹⁰³ This critique is not though as clear as suggested, as where impoverishment is for reasons of one’s race, religion, nationality, membership of a particular social group, or political opinion, it may be the basis for a claim. That is, it is a question of discrimination as well as the degree of interference with one’s rights. According to the UNHCR, should such discriminatory measures lead to “consequences of a substantially prejudicial nature for the person concerned”,¹⁰⁴ one could successfully claim refugee status under the 1951 Convention. UNHCR specifically refers to “serious restrictions on [an asylum-seeker’s] right to earn a livelihood, ... or his access to normally available educational facilities” as examples of discrimination rising to the level of persecution.¹⁰⁵ In this way, economic motivations for flight can be relevant to a claim to asylum under the 1951 Convention. Moreover, UNHCR indicates that the distinction between economic migrants and refugees is indeed blurred, even for the purposes of the 1951 Convention. It states:

The distinction between an economic migrant and a refugee is, however, sometimes blurred in the same way as the distinction

102 See GA res. 36/133, 14 Dec. 1981, preambular para. 6; Vienna Declaration and Programme of Action, 24 June 1993, UN doc. A/CONF.157/24, 13 Oct. 1993.

103 See e.g., B. Ibhawoh, *Defining Persecution and Protection: The Cultural Relativism Debate and the Rights of Refugees*, in N. Steiner, M. Gibney & G. Loescher (eds.), *Problems of Protection: The UNHCR, Refugees, and Human Rights*, Routledge, New York (2003) 61.

104 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 the Protocol relating to the Status of Refugees*, Geneva (1979, re-edited 1992), para. 54.

105 *Ibid.*

between economic and political measures in an applicant's country of origin is not always clear. Behind economic measures affecting a person's livelihood there may be racial, religious or political aims or intentions directed against a particular group. Where economic measures destroy the economic existence of a particular section of the population (e.g. withdrawal of trading rights from, or discriminatory or excessive taxation of, a specific ethnic or religious group), the victims may according to the circumstances become refugees [under the 1951 Convention] on leaving the country.¹⁰⁶

The situation of critical food shortages coupled with forced evictions and forced displacement facing thousands of Zimbabweans under Robert Mugabe immediately springs to mind.¹⁰⁷ UNHCR even goes on to suggest that the 1951 Convention definition may be applicable, depending on the circumstances, to those fleeing *general* economic measures (that is, those applied to the whole population without discrimination).¹⁰⁸

So, in comparison, what can be said in relation to persons fleeing a breach of their economic rights under the OAU Convention? Resistance to this approach would seem to derive from the underlying debates surrounding the nature of economic, social and cultural rights versus their civil and political counterparts.¹⁰⁹ As African countries have been among those promoting the recognition of, and respect for, economic rights,¹¹⁰ it is arguable that the deprivation of such rights ought to be grounds for asylum on the continent. The issue at heart is, however, one of goodwill (and on the other side, sovereignty) as well as the economic capacity of neighbouring African countries to receive and to support persons who may be in a similar, albeit more severe, predicament as their own nationals, rather than the question of economic rights *per se*. The same can be said in relation to persons seeking protection under the Cartagena Declaration. While there is certainly acknowledgement of the "economic and political crises" precipitating the Declaration's enactment, as well as the inter-relationship between civil and political and economic, social and cultural rights in associated documents, Latin American governments have been keen to delineate between "refugees" and

106 *Ibid*, para. 63.

107 See e.g. Amnesty International, *Press Release Mass forced evictions of Zimbabweans continues*, Aug. 2005.

108 UNHCR, *Handbook on Procedures and Criteria*, *supra* note 104, para. 64.

109 For a discussion on the civil and political rights versus economic, social and cultural rights divide, see e.g., J. Donnelly, *Universal Human Rights in Theory and Practice*, Cornell University Press (1989); K. Vasak (ed.), *The International Dimensions of Human Rights*, Greenwood Press (1982); R. Beddard and D.M. Hill (eds.), *Economic, Social and Cultural Rights: Progress and Achievement*, Macmillan (1992).

110 See Preamble para. 7 of the African Charter on Human and Peoples' Rights (21 ILM 58 (1982), adopted 27 June 1981; entered into force 21 Oct. 1986), which states: "Convinced that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural in their conception as well as universality, and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights". See, also, Art. 22 on the right to economic, social and cultural development.

“persons who migration for other reasons, including economic ones ...”¹¹¹ I would argue that legalistically there is nothing stopping the OAU Convention from being interpreted to include persons who are compelled to leave their country as a result of dire economic conditions (in other words, severe deprivations of economic rights) that seriously disrupt public order. After all, economic order is part of the concept of public order according to Bewes and others. While most governments are reticent to open up the refugee definition under any of the international or regional instruments to incorporate “economic refugees”, these problems will not go away by simply refusing to define such persons as “refugees”.

(vi) Environmental “Refugees”

“There are fast-growing numbers of people who can no longer gain a secure livelihood in their homelands because of drought, soil erosion, desertification, deforestation and other environmental problems. In their desperation, these “environmental refugees” ... feel they have no alternative but to seek sanctuary elsewhere, however hazardous the attempt.”¹¹² A new study in 2005 estimates that the “deteriorating environment”, including rising sea levels, expanding deserts and catastrophic weather-induced flooding, could drive about fifty million people from their homes by 2010.¹¹³ So-called “environmental refugees” therefore represent a huge problem in reality, although most tend to remain inside national borders. In the 2005 study, the United Nations University called for the definition, recognition and support to “environmental refugees” as a new category, as it is not generally accepted that such persons satisfy existing refugee definitions under international and regional laws. But the question has to be asked whether the African definition of a “refugee” could be interpreted to meet these challenges facing many parts of the world, including particularly sub-Saharan Africa?

Rwelamira states that “The phrase “events seriously disturbing public order” is designed to cover a variety of *man-made* conditions which do not allow people to reside safely in their countries of origin ...”¹¹⁴ (my emphasis) Even though Rwelamira claims that Article 1(2) of the OAU Convention was designed to cover “man-made” conditions, he later argues that “the expanded definition was more than timely, providing the necessary flexibility to include even victims of ecological changes such as famine and drought.”¹¹⁵ In spite of this internal inconsistency,¹¹⁶ he raises a bona fide question. Taking the more conventional approach, James Hathaway asserts that the OAU Convention covers persons fleeing across

111 Part I, para. 5, Part II, paras. 9 and 10 of San José Declaration on Refugees and Displaced Persons, 7 Dec. 1994, respectively. See, also, A.C.P. Caldeira, *Responding to the Crisis in El Salvador: A Public Order Perspective*, 8 Yale J. World Pub. Order (1980-81) 325.

112 N. Myers and J. Kent, *Environmental Exodus: An Emergent Crisis in the Global Arena*, Climate Institute, Washington D.C. (1995).

113 Reuters, *Environmental decay may prompt refugee surge-study*, 11 Oct. 2005. [study not available at the date of writing].

114 M.R. Rwelamira, *Editorial: Two Decades of the 1969 OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa*, 1(4) IJRL (1989) 557, 558.

115 *Ibid.*, 558.

116 It is of course arguable that such disasters have an element of human construction.

national borders by reason of “any *man-made* disaster.”¹¹⁷ (my emphasis) He argues that the OAU definition “... does not ... suggest that victims of natural disasters or economic misfortune should become the responsibility of the international community ...”¹¹⁸ The 1951 Convention has also been criticised for not including persons fleeing environmental destruction caused by State action in relation to industrial activity and exploitation, including situations brought about by long-term human activity.¹¹⁹ Besides it is not always easy to determine the exact cause of flight. For example, “[t]he Rwandan [genocide] is often portrayed as a classical case of population growth putting pressure on scarce land, and thus precipitating ethnic conflict between the Tutsis and Hutu.”¹²⁰ Would this conflict thus be characterised as an environmental or ethnic conflict, or both?

Determining whether so-called “environmental refugees” fit within the OAU Convention definition will, like the other uncertain categories of “refugees” mentioned above, depend upon the scope of understanding given to the term “public order”. Some commentators suggest that “public order” refers to “social and political unrest caused by human activities and not by nature.”¹²¹ An alternative approach is that “public order” may be defined as the sum of rules that ensure the peaceful and effective functioning of society.¹²² As looting and general crimes often follow such events, including in some cases the complete collapse of the system of law and order, it is arguable that persons fleeing these correlative events could seek protection under the OAU Convention. In addition, Joseph et al recognise the prohibition from entering earthquake or avalanche zones as justifiable restrictions on freedom of movement rights under the ICCPR. It seems a little absurd though for an individual to receive international protection from associated civil disobedience, but not from the precipitating event. While commentators warn against expanding the definition to include persons fleeing natural disasters,¹²³ one has to question why. Is it because countries believe they cannot cope with additional refugees, or is it assessed that their needs are less serious? Perhaps the concern is not that such persons should not be granted a form of temporary protection, but that they should not benefit from the range of rights itemised in current refugee treaties?

117 Hathaway, *supra* note 38, at 16–21.

118 *Ibid.*

119 See e.g., G.S. McCue, *Environmental Refugees: Applying International Environmental Law to Involuntary Migration*, 6 Geo. Int'l Envtl. L. Rev. (1993) 151; J. B. Cooper, *Note: Environmental Refugees: Meeting the Requirements of the Refugee Definition*, 6 NYU Envtl. L. J. (1998) 480; J. Hong, *Refugees in the 21st Century: Environmental Injustice*, 10 Cornell J. L. & Pub. Pol'y (2001) 323. They refer, inter alia, to the 1984 toxic leak in Bhopal, India, and the 1986 Chernobyl incident in Ukraine, as examples of environmental disasters that have caused human migration.

120 Castles, *supra* note 65, at 24.

121 Rankin, *supra* note 15, at 20.

122 *Siracusa Principles on the Limitations and Derogation Provisions in the International Covenant on Civil and Political Rights*, 7 Hum. Rts. Qty (1985) 3.

123 Rankin, *supra* note 15, at 20; H.G. Espiell et al., *Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America*, 83 Int'l J. Ref. L. (1990) 96.

Although it might be possible to argue effectively that the OAU definition covers environmental disasters, whether linked to human activity or not, it is notable that this has not been openly accepted by receiving States. Even though such persons are frequently given refuge on the territory of neighbouring States (e.g. Congolese fleeing the eruption of Mount Nyiragongo in January 2002 sought refuge in Rwanda), receiving States rarely declare that they are acting pursuant to their OAU Convention obligations. Thus, while there may be some State practice to suggest that “environmental refugees” merit protection under the OAU Convention, it is not backed up by *opinio juris*. The UNHCR, too, has been quick to point out, for example, that its “time-limited humanitarian assistance in Sri Lanka and Indonesia in response to the December 2004 tsunami” was at the request of the Secretary-General of the UN.¹²⁴ In doing so, it highlighted its perceived lack of mandate over “environmental refugees”. Why government pronouncements are important is relevant to whether they support or reject liberal interpretations of the OAU Convention definition. Without such statements, the arguments appear at best theoretical. In part, UNHCR’s influence over and with regional bodies has meant that discussions have not tended to take up the challenge of this category of displaced persons.¹²⁵ In spite of these difficulties in relation to treaty definitions and State responses, the general practice of receiving and hosting “environmental refugees” may be seen as contributing to the development of a right of temporary protection on humanitarian grounds under customary international law, rather than under treaty.

(e) “... in either part or the whole of his [or her] country of origin or nationality”

The wording incorporated into Article 1(2) of the OAU Convention has left many questions unanswered. The last phrase is no exception. Does the wording “in part or in whole of the territory” apply to each of the grounds, or only to the last? This is an often overlooked question, yet critical to accurate refugee status determination. If we take a literal interpretation of the provision, the omission of a comma between this phrase and the last ground indicates that it should attach only to the latter. Therefore, we should read the definition as “events seriously disturbing public order in part or the whole of his [or her] country of origin or nationality”. That is, such events need not be experienced country-wide. Thus, status should be granted to an applicant who was compelled to flee a locally- or regionally- specific unrest. Adopting this literal interpretation implies that external aggression, occupation and foreign domination must, by comparison, exist throughout the territory. Having said this, however, the international requirement associated with the first three terms suggests that they are experienced throughout the whole of the territory *de jure*, even if the actions are limited to specific parts of the territory *de facto*. Should this argument not be accepted, the

124 UNHCR, *Note on International Protection*, UN Doc. A/AC.96/1008, 4 July 2005, para. 36.

125 See e.g., Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America, Mexico City, 16 Nov. 2004.

alternative, more humanitarian, approach is to argue that this final phrase applies to each of the grounds and should not be unduly limited to the last one. A mere drafting oversight is insufficient to discard the underlying humanitarian object and purpose of the OAU Convention to protect persons fleeing such situations. In this way, it is arguable that the final phrase applies to each of the grounds and reflects a general intention to adopt a wide approach. This though may again raise the question of to what extent the last ground renders superfluous or irrelevant the other three grounds.

2. The Question of Subjectivity Revisited

(a) “was compelled to leave his [or her] habitual residence”

It has been taken for granted by most commentators that the OAU Convention is an objective test, rather than a subjective one. It is commonly argued that Article 1(2) does not address any subjective element of fear, but only considers “objective conditions prevailing in the country of nationality or habitual residence.”¹²⁶ Rwelamira praises the definition “in its attempt to link the refugee with the actual causes of the refugee problems”¹²⁷ and “emphasizing objective conditions in the country of origin.”¹²⁸ Oloka-Onyango praises the move away from the 1951 Convention’s “well-founded fear of persecution” standard, arguing that the OAU Convention “explicitly gave credence to the fact that a refugee exodus could be the result of factors of a more general nature, intrinsic to the country in question, rather than to the individual subjective status or fears of the refugee.”¹²⁹ Similarly, Arboleda states that individuals finding themselves in one or more of the situations enumerated in Article 1(2) “would acquire, *ipso facto*, the status of refugee. They would not have to justify their fear of persecution, as would have been required under the 1951 Convention.”¹³⁰ But, is the definition in Article 1(2) so clear as to reject any subjective analysis? I put forward three reasons why the OAU definition is more subjective than perhaps has been stated previously.

First, the definition is framed in terms of individual status. I would argue that this necessitates inquiring into the individual or subjective reasons for flight of each applicant. Second, although group or *prima facie* recognition has been the approach of most African governments to refugee situations in Africa, the ability to grant such status has been wrongly derived from the OAU Convention.¹³¹ In fact, the OAU Convention does not provide any such mechanism.¹³² In recognising this erroneous belief, it is also open to adopt a similar, group approach

126 Rwelamira, *supra* note 114, at 559. See also Arboleda, *supra* note 31, at 94.

127 *Ibid.*, at 558–9.

128 *Ibid.*, at 558.

129 Oloka-Onyango, *supra* note 23, at 455.

130 Arboleda, *supra* note 19, at 194.

131 See I. Jackson, *The Refugee Concept in Group Situation*, Martinus Nijhoff Publishers, The Hague (1999) at 2. Cf. Rankin, *supra* note 15, at 7, who argues that the “africanised notion of asylum is cohered around the quality of the community, instead of around the quality of the individual”.

132 Okoth-Obbo, *supra* note 24, at 120.

under the 1951 Convention to persons fleeing conflict that is *prima facie* characterised by persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion. In fact, UNHCR's Handbook on refugee status under the 1951 Convention and/or 1967 Protocol confirms this, by acknowledging that "situations have also arisen in which entire groups have been displaced under circumstances indicating that members of the group could be considered individually as refugees ... Recourse has therefore been had to so-called "group determination" of refugee status, whereby each member of the group is regarded *prima facie* ... as a refugee [under the 1951 Convention and/or 1967 Protocol]."¹³³ Hathaway, too, points out that group protection has its "historical antecedents in European practice."¹³⁴

The third aspect which indicates that subjective factors are relevant is the explicit requirement that an applicant needs to show that he or she was "compelled" to depart his or her country of origin or nationality, that is, he or she must be individually compelled. While this is partly a question of causation, I argue that it also introduces a further individualised or subjective component to the inquiry. That is, objectively, the applicant must have fled due to or "owing to" one or more of four different events or situations listed, and subjectively, these factors must have "compelled" him or her to leave his or her place of habitual residence. The element of compulsion is also required where events seriously disturb public order in only part of the country. To this extent, praising the omission of a subjective element of "fear" by some writers seems to be over-stated. It is not so much the question of establishing a claimant's subjective "fear" of persecution under the 1951 Convention definition that has caused difficulties for refugee claimants,¹³⁵ rather it is assessing whether that fear is "well-founded".¹³⁶ The "objective" terms of the OAU Convention could also cause some difficulties in this regard. Even though individual targeting or selective harassment is not a necessary component of the OAU definition, there must be some link or nexus between the objective event and the fact that the individual felt compelled to flee. What "compulsion" means in this context is though unclear as it is not a regularly used legal term, nor is it readily definable. The absence of reported case law in the region makes it even more speculative. According to the *Shorter Oxford English Dictionary*, "compel" is defined as "... to urge irresistibly, to constrain, oblige, force; to take or get by force, ... to bring about by force, or moral necessity; to command; to force to come, go, or proceed; to force..." The ordinary meaning of the term does not assist us to make much sense of this aspect of the definition, except that an asylum-seeker needs to prove that they were "forced" to flee by one of the events listed.

To put this into perspective, it would not be unreasonable in status procedures

133 UNHCR, *Handbook on Procedures and Criteria*, *supra* note 104, at para. 44.

134 Hathaway, *supra* note 38, at 16–21.

135 See e.g., A. Grahl-Madsen, *The Status of Refugees in International Law*, A.W. Sijthoff, Leyden (1966) 173–174.

136 Claims under the 1951 Convention have also struggled with the nexus or causal link between persecution and one of the five enumerated grounds in Article 1A(2).

to require a claimant from Kinshasa, DRC, to justify why he or she departed the city on the basis of generalised violence occurring in North Kivu, an area thousands of miles from the capital. In all likelihood, it would be quite difficult for him or her to prove that he or she was “compelled” to leave as a result of those events if one only considered the objective facts. Importing a subjective analysis does not mean that an individual needs to prove that flight was the *only* alternative available, but it does introduce a causal connection or nexus between the flight and the event in question. This might be established through an analysis of the individual circumstances of the asylum-seeker, including his or her location relative to the site of the disturbance, the nature of the disturbance and the possibility of the violence spreading to the area in which the asylum-seeker resides, the credibility of his or her statements, any particular factors specific to the asylum-seeker, such as ethnicity, race, religion or political affiliations or opinions, or on the basis of fear. These factors are largely subjective, rather than objective.

Moreover, relying solely on objective criteria could (and does) give rise to situations where asylum is sought by persons who flee for reasons unconnected to the event in question, but who can use that event to claim asylum. This is certainly not what the drafters had in mind, but it is increasingly becoming an issue with mixed migration-asylum flows. In comparison to the OAU Convention, it is noticeable that the Cartagena Declaration requires that persons have fled “*because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.*” (emphasis added) The Cartagena Declaration clearly restricts the scope of refugee protection beyond merely the objective existence of one or more of the listed situations.

In addition, without some form of assessment of the subjective or individual motivations for flight, credibility becomes almost irrelevant. In fact, particularly in countries of secondary or tertiary asylum, status determination may simply become a question of conducting a nationality assessment, rather than an examination of whether an applicant satisfies the criteria of the OAU Convention. Hathaway notes that persons can be granted refugee status in spite of what they say.¹³⁷ In other cases, subjective factors may aid an applicant’s case, such as where he or she is alone or among few persons to flee, but the applicant has particular reasons for feeling compelled to escape. An entirely objective assessment, without giving due account to his or her subjective or personalised reasons, such as ethnicity, race, religion, political opinion, or sex, may result in asylum being denied. Applying all elements of the definition to each case vigilantly is an essential part of maintaining the integrity of the protection system and of ensuring that asylum is not the home for fraudulent applicants who do not have refugee-related reasons for flight.

137 J.C. Hathaway, paper presented at the EU Presidency Seminar entitled *International Protection within One Single Asylum Procedure*, organised by the Swedish Migration Board, the EU Commission and the US Department of State, Norrköping, 23–24 April 2004, as referred to in B. Gorlick, *Common Burdens and Standards: Legal Elements in Assessing Claims to Refugee Status*, 15(3) *IJRL* (2003) 357, 360.

IV. THE CONTINUING RELEVANCE OF THE 1951 CONVENTION DEFINITION

The 1951 Convention definition was retained in Article 1(1) of the OAU Convention, yet it is still seen as being inapplicable or irrelevant to the African context of forced displacement. I would argue the opposite. I would assert that the 1951 Convention has a broader scope of application than it is given credit for. While case-by-case adjudication has, at least in the European, North American and Australian contexts, been able to endorse narrow interpretations and thereby “leav[ing] thousands ‘outside’ or ‘beyond’ protection”,¹³⁸ this cannot be faulted to its terms *per se*.

First, the 1951 Convention definition, minus its geographical and temporal limitations, was not irrelevant to the situation gripping Africa in the 1960s to 1980s. Its modified formulation of 1967 applied to individuals fleeing the ravages and excesses of colonialism. Forced displacement, serious restrictions on freedom of movement, armed attacks, violence, and other serious human rights violations, constitute forms of persecution protected by the 1951 Convention. Such persecution was driven by colonial and racist ideologies and could therefore have easily been linked to the grounds of “race” or “nationality” of the 1951 Convention definition. While the element of “persecution” has been interpreted as a form of “selective harassment”, it has also been held that “it is not necessary that conduct complained of should be directed against a person as an individual. One may be persecuted because she [or he] is a member of a group which is subject of systematic harassment.”¹³⁹ Similarly, the UNHCR has stated that “the fact that a law is of general application is not in itself determinative if that law is contrary to international human rights law or otherwise targets a particular group.”¹⁴⁰

Second, the nature of modern conflicts in many African countries (e.g. Burundi, Rwanda, the Ivory Coast and the Sudan) confirms that it is no longer determinative that generalised violence or war precludes an applicant from being granted refugee status under the 1951 Convention. This is the case where such conflicts have an ethnic or religious dimension, or where political opinions are imputed to persons from particular racial, ethnic, religious or social groups, or from particular geographical areas. “Moreover, it is nowadays widely recognised that war and violence may be used as instruments of persecution.”¹⁴¹ However, it is also noted that a general link to one of the five grounds in the 1951 Convention would deny protection to someone caught up in generalised violence without an

138 G. Goodwin-Gill, *Asylum: The Law and Politics of Change*, 7 IJRL (1995) 1, at 8. See also J. Oloka-Onyango, *The Plight of the Larger Half: Human Rights, Gender Violence and the Legal Status of Refugees and Internally Displaced Women in Africa*, 24 Denver J. Int'l L. and Policy (1996) 349, on how the definition by failing to be applied to breaches of economic and social rights ignores a large number of women in Africa.

139 *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379; *Minister for Immigration and Multicultural Affairs v Ibrahim* [2000] HCA 55, paras. 196–199 (Kirby J.).

140 UNHCR, *Note on Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees*, April 2001, para. 18.

141 UNHCR, *The 1951 Convention relating to the Status of Refugees: Its Relevance in the Contemporary Context*, 1 Feb. 1999, para. 7, referring to various EXCOM Conclusions.

associated racial, religious, ethnic, social, or political dimension. This is where the OAU Convention definition steps in.

Taking a snapshot of the range and types of cases from African claimants in the last two decades provides the third reason why the 1951 Convention continues to be relevant to African asylum-seekers. The range of cases is extensive: female genital mutilation, domestic violence, trafficking for the purposes of forced prostitution, sexual slavery or forced labour, rape and sexual violence, disproportionate or cruel, inhuman or degrading treatment or punishment for refusing to adhere to traditional practices (e.g. refusing to wear the veil, leading “westernised” lifestyles, etc.), discrimination and harassment for reasons of differing sexual orientation, forcible or underage recruitment into military service, draft deserters or evaders, conscientious objectors, and forced or underage marriage. These types of claims are increasingly making up the factual basis for many asylum applications in western countries, many originating from Africa.¹⁴² This is not to ignore the range of political opinion cases or those fleeing religious or ethnic persecution that continue to be prominent in many contexts. These types of claims would not always fit within Article 1(2) of the OAU Convention due to their individualised nature, their lack of impact on public order, or the absence of an international element. Moreover, not all countries in Africa are party to the OAU Convention and thus make the 1951 Convention the only protection treaty applicable.¹⁴³

V. CONCLUSION

It is clear that resources limit the extent of individual refugee status determination in Africa,¹⁴⁴ as well as its impracticality in large-scale flows that characterise most African refugee crises. However, it must be equally recognised that the prevalence of individual assessments is indeed increasing and that appropriate guidance is needed for decision-makers, lawyers, and asylum-seekers alike. This article sought to take a renewed look at the individual elements of the definition of a “refugee” and to highlight some difficulties of interpretation associated with the OAU Convention definition. Many of these questions remain unresolved. While there is no single or easy interpretation of the OAU Convention definition, there are many possibilities. The assertion that the definition provides an objective test ought to be re-considered, especially in the context of individual assessments. The politics surrounding the meaning of the first three grounds (external aggression, occupation or foreign domination) has meant that they will

142 See, A. Edwards, *Age and Gender Dimensions in International Refugee Law*, in E. Feller, V. Türk and F. Nicholson (eds.), *supra* note 72, 46, at 52–54 and 57.

143 E.g. Djibouti, Madagascar (although it retains the geographical limitation), Namibia, Somalia, Sao Tome and Principe, and Morocco. Morocco suspended its membership of the African Union in 1984 and allegedly withdrew from its associated treaty obligations, including the 1969 OAU Convention. Eritrea, Mauritius and Sahrawi Arab Democratic Republic are not parties to the 1951 Convention, the 1967 Protocol or the OAU Convention.

144 See, e.g., J. van Garderen and V. Jaichand, Preface in J. Handmaker, L.A. de la Hunt, J. Klaaren (eds.), *Perspectives on Refugee Protection in South Africa* (2001), available at <http://www.lhr.org.za/refugee/book/contents.htm>.

be rarely applied in practice, thus placing heavy emphasis on the fourth ground, which is problematic due to its vague wording. This article has shown that the OAU Convention definition, once believed to be the stalwart of the African refugee protection regime, requires innovative interpretations for it to be applied to a range of situations not foreseen by its drafters. It could be argued that its greatest triumph rests less in its specific terms than in its liberal and generous application on the continent. Like the OAU Convention, the 1951 Convention has been forced to evolve alongside changing realities in developing countries. Many refugee lawyers and government officials wrongly reject it as not applying to asylum cases in Africa, or see it as secondary to the OAU Convention definition in Article 1(2). This is partly due to inadequate status determination procedures that have, as yet, failed to elaborate any comprehensive jurisprudence. It is also partly due to a lack of substantive interpretative guidance on the application of these instruments in Africa by the UNHCR or the African Union. In fact, as shown in this article, the 1951 Convention continues to hold a key source of protection for many individuals forcibly displaced there, including those fleeing ethnically- or religiously- linked civil conflicts. What also emerges from this review is that each of these instruments has their own particular scope of protection, *as well as* areas of overlap. And, although these two instruments are largely complementary, there are still persons in need of international protection who may fall between the gaps of both instruments and who remain largely unprotected on the continent, such as environmental or socio-economic “refugees”.