THE REGIONAL LAW OF REFUGEE PROTECTION IN AFRICA

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ABSTRACT

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This work offers an analysis of the legal regime for refugee protection in Africa, broadly construed as including both refugee law and human rights elements. The regime is addressed in two parts.

Part One analyses the treaty regime, principally comprised of the 1951 Convention relating to the Status of Refugees, the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa and the African Charter on Human and Peoples' Rights. The latter two regional instruments are examined in depth. This includes the first fulsome account of the 1969 Convention's drafting, and original analysis of the relationships of interpretation and the relationships of conflict that arise between the various treaties comprising the regional refugee protection framework. Significant attention in this regard is devoted to various aspects of the relationship between the international and the regional refugee treaties, and to the relationships between African refugee law on the one hand and African human rights law on the other.

Part Two focuses on the institutional architecture supportive of the treaty framework addressed in Part One. The Organization of African Unity is addressed in a historical sense, and the contemporary roles of the African Union, the African Commission on Human and Peoples' Rights and the various African human rights courts are canvassed.

This account of the treaty framework, and the institutional architecture, for refugee protection on the continent is the first broad analytical account of the regional law of refugee protection in Africa.

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PART TWO: THE INSTITUTIONAL ARCHITECTURE

ACRONYMS AND ABBREVIATIONS

1951 Convention	Convention relating to the Status of Refugees
1967 Protocol	Protocol relating to the Status of Refugees
1969 Convention	Convention Governing the Specific Aspects of Refugee Problems in Africa
1969 Events	External aggression, occupation, foreign domination or events seriously disturbing public order
AALCC	Asian-African Legal Consultative Committee
Abuja Treaty	Treaty Establishing the African Economic Community
AEC	African Economic Community
African Charter	African Charter on Human and Peoples' Rights
African Commission	African Commission on Human and Peoples' Rights
AHG	African Union Assembly of Heads of State and Government
AU	African Union
BPEAR	Bureau for the Placement and Education of African Refugees
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CCAPRRI	Coordinating Committee on Assistance and Protection to Refugees, Returnees and Internally Displaced Persons
CCAR	Coordinating Committee on Assistance to Refugees
Children's Charter	African Charter on the Rights and Welfare of the Child
CM	African Union Council of Ministers
Commission	Commission of Ten/Fifteen/Twenty/the Whole on Refugee Problems in Africa
Committee of Legal Experts	1969 Convention drafting committee
CSSDCA	Conference on Security, Stability, Development and Cooperation in Africa
DRC	Democratic Republic of Congo

ECA	United Nations Economic Commission for Africa
ExCom	Executive Committee of the United Nations High Commissioner for Refugees' Programme
HARDP	African Union Division of Political Affairs' Division of Humanitarian Affairs, Refugees and Displaced Persons
HRC	United Nations Human Rights Committee
ICARA	International Conference on Assistance to Refugees in Africa
ICCPR	International Covenant on Civil and Political Rights
IDP	Internally displaced person
ILC	International Law Commission
Interim Court	African Court on Human and Peoples' Rights
Interim Court Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights
Kampala Convention	Convention for the Protection and Assistance of Internally Displaced Persons in Africa
Merged Court	African Court of Justice and Human Rights
Merged Court Protocol	Protocol on the Statute of the African Court of Justice and Human Rights
New Merged Court	African Court of Justice and Human and Peoples' Rights
New Merged Court Protocol	Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights
NGO	Non-governmental organisation
OAHG	Organization of African Unity Assembly of Heads of State and Government
OAU	Organization of African Unity
OAU Charter	Charter of the Organization of African Unity
OCM	Organization of African Unity Council of Ministers

PRC	African Union Permanent Representatives Committee
PSC	African Union Peace and Security Council
RSD	Refugee status determination
SADR	Saharawi Arab Democratic Republic
SARRED	International Conference on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN Charter	Charter of the United Nations
UNHCR	Office of the United Nations High Commissioner for Refugees
Vienna Convention	Vienna Convention on the Law of Treaties
Women's Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

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CHAPTER 1

INTRODUCTION

There are just two legally binding regional refugee protection regimes in the world: in Africa and in Europe. Europe hosts 15 per cent of the global refugee population[1] and its refugee law in general[2] and specific aspects of it in particular[3] are the subject of countless books. Africa hosts over quarter of the world's refugees,[4] yet there is no treatise on African regional refugee law.[5] The law of refugee protection in Africa has not received scholarly attention commensurate with the scale of the displacement crisis on the continent.[6] This work, about the regional law of refugee protection in Africa, addresses that gap. It covers the regional treaty regime—broadly construed as comprising both international and regional refugee law, and international and regional

[1] UNHCR, *UNHCR Statistical Yearbook 2013* <http://www.unhcr.org/54cf9bd69.html> accessed 9 June 2015, 7. These are the most up-to-date statistics available; the recent influx of Syrian refugees to Europe has likely altered the figure.

[2] See, for example, Olga Ferguson, *The Common European Asylum System: Background, Current State of Affairs, Future Direction* (TMC Asser 2007); Elspeth Guild, *The First Decade of European Union Migration and Asylum Law* (Martinus Nijhoff 2012).

[3] See, for example, Guy S. Goodwin-Gill and Hélène Lambert (eds), *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (CUP 2010); Hélène Lambert, Jane McAdam and Maryellen Fullerton (eds), *The Global Reach of European Refugee Law* (CUP 2013).

[4] UNHCR (n 1) 7.

[5] Cristiano D'Orsi, *Asylum-Seeker and Refugee Protection in Sub-Saharan Africa: The Peregrination of a Persecuted Human Being in Search of a Safe Haven* (Routledge 2015) canvasses a range of African refugee protection issues—including *non-refoulement*, mass influx, refugee camps, the role of UNHCR and durable solutions—but it is not a legal treatise on refugee protection in Africa.

[6] Among the works describing this crisis are: Jeff Crisp, 'No Solution in Sight: The Problem of Protracted Refugee Situations in Africa' in Itaru Ohta and Yntiso D Gebre (eds), *Displacement Risks in Africa: Refugees, Resettlers and Their Host Population* (Kyoto University Press 2005); Robin Ramcharan, 'The African Refugee Crisis: Contemporary Challenges to the Protection of Refugees and Displaced Persons in Africa' (2000) 8 Afr YB Intl L 119; Bonaventure Rutinwa, 'The End of Asylum? The Changing Nature of Refugee Policies in Africa' (2002) 21 RSQ 12; Guglielmo Verdirame and Barbara Harrell-Bond, *Rights in Exile: Janus Faced Humanitarianism* (Berghahn Books 2005).

human rights law—in Part One, and the regional institutions supportive of this treaty regime in Part Two.

This introductory chapter begins by detailing this two-part structure in more detail. Section B of this introduction then articulates the work's central argument: that the regional legal regime for refugee protection in Africa is under-theorised, in terms of both the depth and breadth with which its constituent elements have been addressed, and in terms of the relationships between these elements. Section B also advances this work's primary contribution to knowledge, which is to remedy this limited articulation of the African regime for refugee protection. Section C then delineates the limits of this otherwise broad work. Section D provides context, with a brief contemporary overview of the state of refugee protection in Africa and of major aspects of the refugee situations in each of Africa's principal sub-regions: East Africa (including the Horn of Africa), Central Africa and the Great Lakes, West Africa, Southern Africa and North Africa.[7] Section E then concludes this introduction with an outline of the work's theoretical approach to regime relationships, which is detailed in this introduction because it underpins the analysis in chapter 4 as well as in chapter 5.

This work is up to date as of 1 June 2015, except where another date is stated in relation to a particular fact or issue.

[7] The sub-regions used here are those employed by UNHCR. East Africa includes Chad, Djibouti, Eritrea, Ethiopia, Kenya, Somalia, Sudan, South Sudan and Uganda. Central Africa and the Great Lakes include Burundi, Cameroon, the Central African Republic, Congo, the Democratic Republic of Congo, Rwanda and Tanzania. West Africa includes Burkina Faso, Cote d'Ivoire, Ghana, Guinea, Liberia, Mali, Niger and Senegal. Southern Africa includes Angola, Botswana, Malawi, Mozambique, Namibia, South Africa, Zambia and Zimbabwe. North Africa includes Algeria, Egypt, Libya, Mauritania, Morocco, Tunisia and the Western Sahara Territory.

A. STRUCTURE

Part One, on the regional treaty framework for refugee protection in Africa, contains four chapters. The first, chapter 2, lays the foundation for understanding the regional refugee instrument: the Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa[8] (1969 Convention).[9] It provides brief overviews of the 1969 Convention and of the OAU, the continental organisation responsible for its adoption. The 1969 Convention is poorly understood in part because it has no official *travaux préparatoires*. Informed by primary source research, chapter 2 goes on to sketch a drafting history of the 1969 Convention. Chapter 3 builds upon this basic and historical foundation by analysing the legal innovations of, and pervasive misconceptions about, the 1969 Convention.

Chapter 4 then moves on to an issue entirely absent from the literature on the 1969 Convention: the relationships between it and its international counterpart, the Convention relating to the Status of Refugees[10] (1951 Convention). This includes both the overall systemic relationship between the 1951 Convention and the 1969 Convention, as well as discrete relationships of interpretation and relationships of conflict between the two instruments. Relationships of interpretation are those in

[8] Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45.

[9] Many commentators use 'OAU Convention'. '1969 Convention' is employed here because the OAU no longer exists (see chapter 6). Indeed, in early 2011 it was noted that the African Union had replaced 'OAU' with 'AU' in its presentation of the Convention on its website.

[10] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

which one norm assists in the interpretation of another.[11] In relationships of conflict, by contrast, two applicable norms point to incompatible conclusions.[12] Chapter 4 analyses the systemic relationship between the 1951 and 1969 conventions in terms of refugee status determination (RSD) as well as in terms of refugee rights, and isolated relationships of interpretation and relationships of conflict between the two instruments. Together, chapters 2, 3 and 4 constitute a complete historical and contemporary analysis of the 1969 Convention.

Part One concludes with chapter 5's discussion of the role of regional human rights law in refugee protection in Africa. This includes a general discussion of human rights in refugee protection, a more specific discussion of the role of the core African human rights instruments—principally the African Charter on Human and Peoples' Rights[13] (African Charter)—in refugee protection and, finally, analysis of several relationships of interpretation and relationships of conflict between the African Charter and the 1969 Convention.

Part Two then turns to the institutional architecture for refugee protection in Africa. A refugee, by definition, lacks the protection of his or her state of nationality or—in the case of a stateless refugee—former habitual residence, and the duty of protection falls to the host state. In discharging this duty, host states are supported by the Office of the United Nations High Commissioner for Refugees (UNHCR), the

[11] International Law Commission, 'Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (2006) 2 UNYBILC 175 (ILC) para 2.

[12] ibid.

[13] Adopted 27 June 1981, entered into force 21 October 1986, 21 ILM 58.

mandate of which includes assisting governments in 'seeking permanent solutions for the problem of refugees'[14] and supervising the application of the 1951 Convention.[15] At the regional level, the African Union (AU) plays a role similar—though not entirely analogous—to that of UNHCR. Goodwin-Gill and McAdam explain that the 'protection of refugees may … be promoted, directly and indirectly, by regional organizations', and cite the AU as an example.[16] Indeed, the involvement of the AU's predecessor, the OAU, in refugee protection is clearly contemplated by the 1969 Convention,[17] and the AU, and the OAU before it, have engaged consistently with the issue.[18] Moreover, considering the AU as part of the institutional architecture for refugee protection in Africa is responsive to Heyns and Viljoen's call for a 'holistic view of human rights protection in Africa', which includes human rights roles for AU structures beyond simply the African Commission and the human rights courts.[19] Just as no treatment of refugee protection on the international plane would be complete without discussing UNHCR,[20] this discussion of refugee protection in Africa necessarily addresses the OAU and the AU. It does so across two chapters, which together form Part Two of this work.

[14] UNGA, Res 428 (V) (14 December 1950) Annex, para 1.

[15] 1951 Convention (n 10) art 35.

[16] Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 444.

[17] Under article VII, states parties are required to provide the OAU with 'information and statistical data' to enable the OAU's Administrative Secretary-General to 'make reports' to competent OAU organs.

[18] See chapter 6.

[19] Christof Heyns and Frans Viljoen, 'An Overview of International Human Rights Protection in Africa' (1999) 15 S Afr J Hum Rts 421, 433.

[20] See, for example, Goodwin-Gill and McAdam (n 16) chap 8.

The first chapter in Part Two, chapter 6, addresses the historical role of the OAU, and the contemporary role of the AU (up to 1 June 2015), in refugee protection in Africa. Chapter 7 then covers the refugee protection roles of AU judicial bodies with human rights mandates. These are the African Commission on Human and Peoples' Rights (African Commission), as well as the various African human rights courts: the African Court on Human and Peoples' Rights (Interim Court), the African Court of Justice and Human Rights (Merged Court) and the African Court of Justice and Human and Peoples' Rights (New Merged Court).

Chapter 8 concludes the work with a summary of its main findings and some recommendations that flow from them.

B. ARGUMENT AND CONTRIBUTION

The core argument running through this work is that the regional legal regime for refugee protection in Africa has thus far been under-theorised, in terms of both the depth and breadth of the analysis of its elements, and regarding the consideration of how these elements relate to each other. The African refugee protection regime consists of overlapping refugee and human rights law components, and the relationships between these components—in particular, between international and regional refugee law, and between regional refugee law and regional human rights law—is itself a critical element of the regime. This work is the first scholarship to construe African regional refugee law as a normative network comprised of

international refugee law, regional refugee law, international human rights law[21] and regional human rights law.

This is not to say that the claim that both the 1951 and 1969 conventions apply to refugees in Africa is novel, nor is this the first work to recognise the role of human rights law in refugee protection in Africa.[22] Rather, it is the first scholarship to examine the relationship between the 1951 and 1969 conventions in any sustained way, and it is the first consider the relational implications of construing human rights law as a core component of the regional regime for refugee protection. Moreover, this work also covers the institutional elements of the regime. Taken together, this consideration of the international and regional refugee law regime, the regional human rights framework, the relationships between these legal instruments and the institutional architecture supportive of this treaty framework represents the first articulation of the regional legal framework for refugee protection in Africa as an interconnected normative network.

C. CONTOURS

Despite this ambition to address refugee protection in Africa with depth and breadth otherwise absent from the literature, the contours of this work are nevertheless delineated in three particular respects. First, while refugees in Africa are of course

[21] See section C.

[22] See, for example, Gina Bekker, 'The Protection of Asylum Seekers and Refugees within the African Regional Human Rights System' (2013) 13 Afr Hum Rts LJ 1; Chaloka Beyani, *Protection of the Right to Seek and Obtain Asylum Under the African Human Rights System* (Martinus Nijhoff 2013); Jamil Ddamulira Mujuzi, 'The African Commission on Human and Peoples' Rights and the Promotion and Protection of Refugees' Rights' (2009) 9 Afr Hum Rts LJ 160.

entitled to the protections afforded by international human rights law—regional law applies alongside, and in addition to, cognate legal frameworks on the international plane—the explicit treatment of human rights law is limited here to the regional legal framework. The role of international human rights law in refugee protection has been addressed elsewhere,[23] indeed with a call for others to 'build upon this basic analysis to define the entitlements of sub-groups of the refugee population entitled to claim additional protections'.[24] This work is responsive to that call, rather than duplicative of the work in which it was made.

Second, a number of sub-regional arrangements in Africa include human rights protection[25] or otherwise affect refugees.[26] Such sub-regional arrangements are beyond the scope of this work, but their impact on refugee protection in Africa is certainly an important avenue of further study.

Third and finally, while the role of UNHCR in Africa could have been covered in Part Two, this is not included because it has been addressed recently elsewhere.[27] Moreover, the focus here is on the *regional* regime. This is supported

[23] See, in particular, James C Hathaway, *The Rights of Refugees Under International Law* (CUP 2005).

[24] ibid 8.

[25] See Frans Viljoen, *International Human Rights Law in Africa* (2nd edn, OUP 2012) chap 11; Frans Viljoen, 'The Realization of Human Rights in Africa Through Sub-regional Institutions' (1999) 7 Afr YB Intl L 186.

[26] See, for example, Jeremy Levitt, 'Conflict Prevention, Management, and Resolution: Africa–Regional Strategies for the Prevention of Displacement and Protection of Displaced Persons: The Cases of the OAU, ECOWAS, SADC and IGAD' (2001) 11 Duke J Comp & Intl L 39; 'Regional Governance, Migration, and Social Protection in Africa and Europe', a special issue of Regions & Cohesion (2014) 3 Regions & Cohesion.

[27] See D'Orsi (n 5) chap 5.

by—but strictly speaking does not include—international organisations such as UNHCR.

D. REFUGEES IN AFRICA

This work is about the law of refugee protection in Africa, not about the practical state of refugee protection there. Nevertheless, it is important to situate the law within the context in which it applies. While it is true that refugees experience rampant violations of their rights throughout Africa—from *refoulement* to violations of fundamental freedoms to the denial of basic socio-economic rights—it is also difficult to generalise about the state of refugee protection on the continent. Africa is subject to a uniform regional legal regime (save for variations due to states' treaty reservations or their not having signed relevant instruments), but displacement and protection trends vary from one country to the next and from one sub-region to the other. The following nevertheless attempts to briefly summarise the contemporary state of refugee protection on the continent and in each of its sub-regions.

At the end of 2013, there were 3.4 million refugees in Africa.[28] The African approach to refugees has historically been[29]—and continues to be[30]—characterised as particularly hospitable, with UNHCR describing the 'generosity of hosting countries

[28] UNHCR, 'Overview of the Refugee Situation in Africa: Background Paper for the High-Level Segment of the 65th Session of the Executive Committee of the High Commissioner's Programme on "Enhancing International Cooperation, Solidarity, Local Capacities and Humanitarian Action for Refugees in Africa"' (23 September 2014) 1.

[29] Rutinwa (n 6) 12.

[30] See, for example, UNGA, 'Assistance to Refugees, Returnees and Displaced Persons in Africa, Report of the Secretary General' (20 August 2015) UN Doc A/70/337, para 3.

in Africa' as 'outstanding'.[31] This has been demonstrated primarily by the 'maintenance of open borders, the provision of essential protection, and the grant of asylum typically through *prima facie* recognition'.[32]

However, while African states continue to welcome refugees, their commitment to asylum has, according to one scholar, been on the wane since the 1990s.[33] UNHCR characterises the decline in more contemporary terms, noting that 'in recent years, some core values of the protection system have been challenged'.[34] Timing aside, the quality and quantity of refugee protection in Africa is doubtlessly declining, as evidenced by a number of contemporary protection problems. According to UNHCR, these include:

> cases of refoulement and/or denial of access to asylum; weak national legal and institutional mechanisms in the protection of refugees; non-enjoyment by refugees of basic rights such as freedom of movement and right to work, [and a lack of] access to basic services including health and education; SGBV [sexual and gender-based violence]; inability to attain self-sufficiency and build livelihoods; difficulty to ensure the sustainability of return and reintegration; pressure on countries hosting exceptionally high numbers of refugees without the financial and human resources to cope; and the lack of reliable data and information on the issues of statelessness and of human trafficking and smuggling.[35]

These issues are in addition to a range of other rights violations refugees experience in their host states.[36]

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[31] UNHCR, 'UNHCR Global Appeal 2015 Update' <http://www.unhcr.org/ga15/index.xml> accessed 24 September 2015, 108.

[32] UNHCR (n 28) 1; on *prima facie* recognition, see chapter 3.

[33] Rutinwa (n 29) 12.

[34] UNHCR (n 31) 108.

[35] ibid 114.

[36] See, for example, Verdirame and Harrell-Bond (n 6).

This decline in the quality of asylum in Africa has occurred for a number of reasons. Foremost among them is the scale of the refugee problem.[37] Africa's refugee population has been rising consistently for the past five years, placing unprecedented demands on host states.[38] Concerns about security, the environmental toll of refugee hosting, the lack of meaningful international responsibility sharing and growing xenophobia have also played a role.[39] These factors are perhaps nowhere more pronounced than in East Africa, the sub-region with the continent's largest refugee population.

At the end of 2014, there were 2.6 million refugees in East Africa.[40] Historically, refugee movements in the sub-region were linked to struggles for independence from colonial powers and post-independence processes of nation building.[41] Today, forced displacement in the sub-region is largely a result of civil conflict. Nearly one million of East Africa's refugees are from war-torn Somalia.[42] A significant portion of East Africa's Somali refugee population resides in Kenya's Dadaab camp complex.[43] With nearly 350,000 inhabitants at the end of June 2015,[44] Dadaab is the largest refugee settlement in the world, and home to well over half of

[37] Rutinwa (n 6) 13.

[38] UNGA (n 30) para 2.

[39] Rutinwa (n 6) 13; UNHCR (n 31) 108.

[40] UNGA (n 30) para 4.

[41] Gaim Kibreab, 'Forced Migration in the Great Lakes and Horn of Africa' in Elena Fiddian-Qasmiyeh and others (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (OUP 2014) 573.

[42] UNGA (n 30) para 7; in this connection, in 2013, UNHCR launched the Global Initiative on Somali Refugees.

[43] ibid para 8.

[44] ibid.

Kenya's 551,000 refugees.[45] This figure positions Kenya as the second-largest refugee hosting country in Africa after Ethiopia, which at the end of June 2015 had more than 700,000 refugees.[46] While it is a major refugee producing state, Somalia also hosts about 22,000 refugees from Yemen, who arrived in the country in the first half of 2015.[47] South Sudan also produces a significant number of the sub-region's refugees. Between December 2013 and June 2015, about 639,000 South Sudanese fled fighting in Upper Nile, Unity and Jonglei states to Ethiopia, Kenya, Sudan and Uganda.[48]

According to the United Nations (UN), midway through 2015 the major refugee protection challenges in East Africa were food insecurity, a shortage of land, limits on humanitarian access and restrictions on refugees' freedom of movement.[49] Kibreab views the latter as the most significant challenge to asylum in the sub-region.[50] He explains that while governments in the area have always been hostile to refugee self-settlement, from the 1960s until the mid-1980s, they nevertheless allowed refugees to self-settle.[51] However, halfway through the 1980s, governments in the sub-region began to enforce encampment. This policy reached its high point in the aftermath of the Rwandan genocide and continues to this day,[52] and constitutes a

[45] ibid para 3.
[46] ibid.

[47] ibid para 9.

[48] ibid para 5.

[49] ibid para 4.

[50] Kibreab (n 41).

[51] ibid 579.

[52] ibid.

major source of undue pressure aimed at inducing refugees to return to their countries of origin.[53]

In June 2015 there were more than 1.1 million refugees in the Central Africa and Great Lakes sub-region, the majority of whom fled conflict or unrest in Burundi, the Central African Republic and eastern Democratic Republic of Congo (DRC).[54] Since political violence erupted in Burundi in April 2015, over 144,000 people have fled the country for DRC, Rwanda, Tanzania, Uganda and Zambia.[55] The Burundi situation was dwarfed, however, by that in the Central African Republic, which at the end of 2014 had produced about 412,000 refugees,[56] many of whom walked for weeks to reach safety and arrived in host states—principally Cameroon—severely malnourished.[57] By the end of 2014, on-going conflict in the east of the DRC, particularly in the Kivus and Katanga and Ituri provinces, had displaced around 358,000 Congolese to Burundi, Rwanda, Tanzania and Uganda.[58]

At the end of 2014 there were 252,000 refugees in West Africa.[59] The majority were displaced from their homes in northern Nigeria, or in contiguous areas in Cameroon, Chad and Niger, by Boko Haram attacks.[60] Conflict between the

[53] ibid 582.

[54] UNGA (n 30) paras 10–5.

[55] ibid para 11.

[56] ibid para 12.

[57] ibid para 13.

[58] ibid para 15.

[59] ibid para 16.

[60] ibid.

government of Mali and armed groups at the end of 2014 also forced some 128,000 Malian refugees to remain abroad in Algeria, Burkina Faso, Mauritania and Niger.[61] More generally, Fresia identifies conflict-induced displacement, expulsion caused by economic crises and the trafficking of minors as key causes of displacement in the West Africa sub-region.[62]

At the end of 2014 there were 174,700 refugees in Southern Africa.[63] Historically, refugees in this sub-region had fled civil wars—resulting predominantly from white minority rule—within Southern Africa. Over the past 20 years, however, there has been a steady increase in arrivals from further afield on the African continent.[64] The main destination countries for these refugees are South Africa and Zambia, which in 2010 together hosted 83 per cent of the total sub-regional refugee population.[65] Protection activities in the sub-region focus on reducing xenophobia and statelessness, addressing mixed migration, strengthening national asylum systems and the promotion of refugees' self-reliance.[66]

States in the North Africa sub-region are typically transit—rather than final—destinations. On-going instability, relative proximity to Europe and the presence of

[61] ibid para 17.

[62] Marion Fresia, 'Forced Migration in West Africa' in Elena Fiddian-Qasmiyeh and others (eds), *The Oxford Handbook of Refugee and Fored Migration Studies* (OUP 2014) 543.

[63] UNGA (n 30) para 19.

[64] Jonathan Crush and Abel Chikanda, 'Forced Migration in Southern Africa' in Elena Fiddian-Qasmiyeh and others (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (OUP 2014) 560.

[65] ibid.

[66] UNGA (n 30) para 19.

smuggling networks make North African countries, particularly Libya, popular starting points for harrowing voyages across the Mediterranean to Europe. However, states in North Africa also host refugees. As of mid-2015, 155,000 Syrian refugees had sought asylum in North Africa. A further 50,000 non-Syrian refugees were also residing in the sub-region,[67] including a relatively sizeable population from Eritrea, Ethiopia, Somalia, South Sudan and Sudan in Egypt.[68] Moreover, Mbera camp in Mauritania hosts about 50,000 Malian refugees, while there are five camps housing approximately 165,000 refugees from Western Sahara near Tindouf in Algeria.[69] The Saharawi refugee situation is among the most protracted worldwide.[70]

E. APPROACH TO REGIME RELATIONSHIPS

Construing the regional regime for refugee protection in Africa as including both refugee and human rights law results in apparent and genuine norm conflicts, as will be demonstrated in chapters 4 and 5. Chapter 4 treats the relationship between the 1951 and 1969 conventions; this analysis raises a number of conflicts between the two refugee instruments. Chapter 5 is about regional human rights law in refugee protection; several conflicts between the African Charter and the 1969 Convention arise from the discussion.

[67] UNHCR 'North Africa region webpage' <http://www.unhcr.org/pages/49e45ac86.html> accessed 24 September 2015.

[68] See Neil Brown, Sean Riordan and Marina Sharpe, 'The Insecurity of Eritreans and Ethiopians in Cairo' (2004) 16 IJRL 661.

[69] UNHCR (n 67).

[70] Sari Hanafi, 'Forced Migration in the Middle East and North Africa' in Elena Fiddian-Qasmiyeh and others (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (OUP 2014) 589.

The approach to conflicts applied here is that postulated by the International Law Commission (ILC) in its Fragmentation Report.[71] The Fragmentation Report poses three questions: '[w]hat is the nature of specialized rule-systems? [h]ow should their relations *inter se* be conceived? [and] [w]hich rules should govern their conflicts?'.[72] This work is primarily concerned with answering the first question in relation to the African regime for refugee protection. Secondarily, it is concerned with answering the second question and, to a lesser extent, the third question regarding the regional and international refugee treaties, as well as regarding the regional refugee and human rights treaties. Because this concern with norm conflicts arises in two chapters—in sections C4 and D of chapter 4 on the relationship between the 1951 and 1969 conventions and in section D of chapter 5 on regional human rights law in refugee protection—the ILC approach to norm conflicts is outlined at the outset in this introduction.

The Fragmentation Report 'adopts a wide notion of conflict as a situation where two rules or principles suggest different ways of dealing with a problem'.[73] The same conception is employed here. This broad notion of conflict must, however, be understood in the context of the strong presumption in international law against normative conflict.[74] As a result of this presumption, the ILC's starting point for resolving norm conflicts is to seek to harmonise apparently conflicting standards

[71] International Law Commission, 'Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law - Report of the Study Group of the International Law Commission' (13 April 2006) A/CN4/L682 (Fragmentation Report).

[72] ibid para 483.

[73] ibid para 25.

[74] ibid para 37.

through interpretation.[75] In this regard, determining the relationship of two or more norms to each other is essentially a process of treaty interpretation, conducted in accordance with the Vienna Convention on the Law of Treaties[76] (Vienna Convention), in particular its articles 31 to 33.[77] Due regard must also be paid to any conflict clauses in the treaties under interpretation.[78] There is, however, a limit to harmonisation: 'it may resolve apparent conflicts; it cannot resolve genuine conflicts'.[79] Apparently conflicting standards become genuine norm conflicts when legal reasoning cannot harmonise them through interpretation. In such circumstances, the ILC approach requires that definite relationships of priority be established.

Relationships of priority can be established by applying one of three interpretive maxims: *lex specialis* (which prioritises specificity), *lex posterior* (which prioritises more recent norms) and *lex superior* (which prioritises hierarchically superior norms).[80] According to *lex specialis*, if 'two or more norms deal with the same subject matter, priority should be given to the norm that is more specific'.[81] *Lex posterior* expresses the rule found in article 30 of the Vienna Convention, which provides that when the parties to a treaty are also party to an earlier treaty concerned with the same matter, and the earlier treaty has not been suspended or terminated, then the earlier treaty applies only to the extent that it is compatible with the later

[75] ibid para 24.

[76] Adopted 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331.

[77] ILC (n 11) para 3.

[78] ibid para 30.

[79] Christopher J Borgen, 'Resolving Treaty Conflicts' (2005) 37 Geo Wash Intl LR 573, 605–6.

[80] Fragmentation Report (n 71) para 412.

[81] ILC (n 11) para 5.

treaty.[82] *Lex superior* relates to status. As there is no general hierarchy of sources in international law, *lex superior* is only relevant regarding conflicts between or among *jus cogens*, obligations *erga omnes* and/or article 103 of the Charter of the United Nations (UN Charter),[83] which are hierarchical in this order.

Neither *lex specialis* nor *lex posterior* 'can be regarded as of absolute validity. There are a number of principles which must be weighed and reconciled in the light of the circumstances of the particular case'.[84] Among these principles are that, as mentioned above, *lex posterior* does not usually apply unless the parties to the treaties under consideration are the same,[85] and it may not apply when the treaties under consideration do not form part of the same regime.[86] The most generally applicable interpretive maxim is thus *lex specialis*. It may not, however, be applied if the nature of the more general law or party intent suggests that it would not be appropriate for the more specialist norm to prevail, the application of the more specialist law would frustrate the purpose of the general law, or third party beneficiaries or the balance of rights and obligations established by the more general law would be negatively affected by the application of *lex specialis*.[87] When *lex specialis* is invoked, the more general law is not extinguished.[88] Rather, it continues to operate 'in the background, continuing to influence the interpretation and application of the norm to which

[82] ibid para 24.

[83] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

[84] CW Jenks, 'The Conflict of Law-Making Treaties' (1953) 30 B YB Intl L 401, 407.

[85] ILC (n 11) para 25.

[86] ibid para 26.

[87] ibid para 10.

[88] ibid para 9.

priority has been given'.[89] Having articulated this approach to resolving norm conflicts, the ILC goes on to issue a caution:

> there are other important rules—for example treaty rules of 'integral' and 'interdependent' nature, 'intransgressible principles', 'elementary considerations of humanity' and treaty clauses that cannot be violated without simultaneously undermining the object and purpose of the treaty—that play a more significant role in the practice of legal reasoning. It may be that focus on the well-known Latin maxims has diverted attention from those more mundane types of relationship of importance.[90]

Further to this ILC-sanctioned approach, the relationships of interpretation identified here will be articulated using traditional modes of treaty interpretation. Relationships of conflict will be resolved by employing interpretive maxims, mindful of the aforementioned other key principles of legal reasoning. Before turning to these relationships, however, we elucidate the instrument at the core of the legal regime for refugee protection in Africa: the 1969 Convention. The next chapter provides an overview of the 1969 Convention and the organisation responsible for its adoption, and situates it in a new historical perspective, which is critical to a full understanding of it.

[89] Fragmentation Report (n 71) para 411.

[90] ibid para 407.

PART ONE: THE TREATY FRAMEWORK

CHAPTER 2

THE DRAFTING OF THE 1969 CONVENTION

A. INTRODUCTION

Analyses of the 1969 Convention[1] have been marred by the lack of *travaux préparatoires*. The absence of any official account of the Convention's elaboration has led to much speculation about the factors that prompted the OAU to adopt a regional refugee instrument. One myth in particular has dominated the discourse: that the OAU's interest in a regional refugee instrument was a result of the failure of the persecution-based 1951 Convention refugee definition to reflect African realities.[2] Relying on the resolutions of OAU bodies, material in UNHCR's archives[3] and the few secondary sources that have seriously considered the drafting of the 1969 Convention[4]—the most valuable of which is often overlooked in the literature[5]—this

[1] Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45.

[2] George Okoth-Obbo, 'Thirty Years On: A Legal Review of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa' (2001) 20 RSQ 79, 109; see, for example, Ousmane Goundiam, 'African Refugee Convention' [1970] Migr News 3, 8; Jennifer Hyndman and Bo Victor Nylund, 'UNHCR and the Status of Prima Facie Refugees in Kenya' (1998) 10 IJRL 21, 34–5; Jamil Ddamulira Mujuzi, 'The African Commission on Human and Peoples' Rights and the Promotion and Protection of Refugees' Rights' (2009) 9 Afr Hum Rts LJ 160, 163; Rachel Murray, 'Refugees and Internally Displaced Persons and Human Rights: the African System' (2005) 24 RSQ 56, 57; Jennifer L Turner, 'Liberian Refugees: a Test of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa' (1994) 8 Geo Immigr LJ 281, 286.

[3] Archival research was conducted in June 2011 at UNHCR headquarters in Geneva, Switzerland.

[4] These are: Louise W Holborn, *Refugees: A Problem of our Time-The Work of the United Nations High Commissioner for Refugees, 1951-1972*, vol I & II (Scarecrow Press 1974); Ivor C Jackson, *The Refugee Concept in Group Situations* (Martinus Nijhoff 1999); Okoth-Obbo (n 2).

[5] This is Holborn (n 4).

chapter corrects this misconception and provides a more complete legal history of the 1969 Convention than has previously been available. In addition to its contribution to the historical record, this chapter provides a foundation for understanding the 1969 Convention, which is itself discussed in more detail in chapter 3; the relationship between the 1951 and 1969 conventions, which is the subject of chapter 4; and the roles of relevant institutions—in particular the OAU and its successor the AU—in refugee protection on the continent, which is addressed in chapter 6.

The chapter begins with overviews of the OAU and the 1969 Convention. The majority of the chapter is then devoted to sketching a drafting history of the 1969 Convention. This reveals that the initial impetus for a regional refugee instrument was to address the problem of subversion and to render international refugee law applicable in Africa. When the latter was achieved in 1967 with the entry into force of the Protocol relating to the Status of Refugees[6] (1967 Protocol), addressing the range refugee issues particular to Africa become the focus of the drafting initiative.

B. THE OAU

The OAU was established on 25 May 1963 to promote regional cooperation among newly independent African states. The organisation's specific purposes were the promotion of the unity and solidarity of African states; co-ordination and co-operation among them to improve the lives of African peoples; defence of their sovereignty, territorial integrity and independence; the eradication of all forms of

[6] Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

colonialism; and the promotion of international co-operation.[7] Added to these goals were those of the Treaty Establishing the African Economic Community (Abuja Treaty),[8] which from 1994 formed a second legal basis of OAU operations.

Despite these lofty goals, the OAU was not created as a legislative body. Rather, OAU objectives were to be achieved primarily via the harmonisation of member state policies.[9] This occurred through the Assembly of Heads of State and Government (OAHG), the OAU's 'supreme organ', the role of which was to 'discuss matters of common concern to Africa with a view to coordinating and harmonizing the general policy of the Organization'.[10] The work of the OAHG was operationalised by the Council of Ministers (OCM or the Council), composed of member states' foreign or other ministers and charged with implementing OAHG decisions and coordinating inter-African co-operation in accordance with OAHG instructions.[11] In addition to the OAHG and the OCM, the OAU was also composed of an Addis Ababa-based General Secretariat and a Commission of Mediation, Conciliation and Arbitration.[12] Other bodies followed later in the organisation's development. For example, in 1993 the Mechanism of Conflict Prevention, Management and

[7] Charter of the Organization of African Unity (25 May 1963) 479 UNTS 39 (OAU Charter) art II(1).

[8] Adopted 3 June 1991, entered into force 12 May 1994, 30 ILM 1241.

[9] Tiyanjana Maluwa, 'International Law Making in the Organization of African Unity: An Overview' (2000) 12 Afr J Intl Comp L 201, 201.

[10] OAU Charter (n 7) art VIII.

[11] ibid art XIII.

[12] ibid art VII.

Resolution was established to prevent conflict and engage in peace building regarding those that were on-going.[13]

The OAU, however, eventually came to be viewed as ineffective. Zard explains that its rigorous adherence to the principle of non-intervention, its subordination to state interest and its persistent financial difficulties often precluded it from 'asserting any form of moral authority or leadership in tackling some of Africa's chronic problems'.[14] Such was especially the case in light of modern challenges facing the continent. Having focused on decolonisation and liberation from minority rule and committed to the principle of non-interference in the internal affairs of member states,[15] the OAU was not equipped to deal with contemporary issues such as economic growth. The first major move to revitalise the regional organisation came in 1999 with the Sirte Declaration, which set out plans to establish what would become the AU.[16] This new body was born—superseding the OAU and incorporating the African Economic Community (AEC)—on 26 May 2001, with the entry into force of its Constitutive Act.[17] At this time, all assets and liabilities of, and all matters relating to, the OAU devolved to the new AU.[18]

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[13] OAU, 'Declaration of the Assembly of Heads of State and Government on the Establishment Within the OAU of a Mechanism for Conflict Prevention, Management and Resolution' (1994) 13 RSQ 174; see Chris J Bakwesegha, 'The Role of the Organization of African Unity in Conflict Prevention, Management and Resolution' (Special Issue 1995) 7 IJRL 207.

[14] Monette Zard, 'African Union' in Matthew Gibney and Randall Hansen (eds), *Immigration and Asylum From 1900 to the Present* (ABC-CLIO 2005) 6–7.

[15] OAU Charter (n 7) art III(2), which lists '[n]on-interference in the internal affairs of States' as a principle of the Union.

[16] OAU (OAHG), 'Sirte Declaration' (OAU Sirte 9 Sept 1999) AHG/Draft/Decl (IV) Rev 1.

[17] Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) 2158 UNTS 3 (AU Constitutive Act). The AU is discussed in chapter 6.

[18] AU (AHG), 'Decision on the Interim Period' (AU Durban 9-10 July 2002) ASS/AU/Dec.1-8(I) para 2.

C. OVERVIEW OF THE 1969 CONVENTION

The 1969 Convention is the regional legal instrument governing refugee protection in Africa. It was adopted on 10 September 1969 at the sixth ordinary session of the OAHG, when it was signed by 41 heads of state or government. It entered into force on 20 June 1974 after ratification by one-third of OAU member states.[19] It has since been ratified by 45 of the AU's 54 member states.[20] The 1969 Convention is a relatively short instrument, containing a preamble and 15 articles. Article I provides two refugee definitions. The first [21] replicates the 1951 Convention refugee definition[22] without its dateline, while the second is unique to the 1969 Convention. It provides,

> [t]he term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.[23]

This definition is addressed in depth in the next chapter.

Like the 1951 Convention, the third paragraph of article I of the 1969 Convention prevents a person with more than one nationality from being recognised as a refugee if he or she has not availed him or herself of the protection of each such state of nationality, unless he or she has a valid reason based on well-founded fear. It is interesting to note that this is accomplished by defining 'a country of which he is a

[19] 1969 Convention (n 1) art XI.

[20] For ratification information, see section D.5 below.

[21] 1969 Convention (n 1) art I(1).

[22] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art 1A(2).

[23] 1969 Convention (n 1) art I(2).

national', even though this term does not otherwise appear in the 1969 Convention.[24] The 1951 Convention defines 'the country of his nationality', which is also used in article 1A(2). The 1969 Convention approach is an instance of careless drafting in what is otherwise a well-written legal instrument.

Article I also covers cessation[25] and exclusion.[26] These two paragraphs largely follow the 1951 Convention provisions, though there are some additions and some omissions. Two additional cessation clauses[27] provide that the 1969 Convention shall cease to apply to any refugee who has 'committed a serious non-political crime outside his country of refuge after his admission to that country as a refugee'[28] or has 'seriously infringed' the 1969 Convention's purposes and objectives.[29] Two further points of distinction regarding cessation are that the 1969 Convention does not include the 1951 Convention clause that prevents the cessation of an individual's refugee status if he or she can 'invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of

[24] Article I(3) of the 1969 Convention provides: '[i]n the case of a person who has several nationalities, the term "a country of which he is a national" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of which he is a national if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national'.

[25] 1969 Convention (n 1) art I(4).

[26] ibid art I(5).

[27] The 1951 Convention's article 1C cessation clauses provide that the 1951 Convention shall cease to apply to any person who would otherwise qualify as a refugee if he or she has: (1) voluntarily re-availed him or herself of the protection of his or her country of nationality; (2) voluntarily re-acquired his or her former nationality; (3) acquired a new nationality and enjoys protection from that country; or (4) has voluntarily re-established him or herself in the country in which he or she feared persecution. It further provides that the 1951 Convention shall cease to apply if (5) the circumstances in connection with which the person was recognised as a refugee have ceased to exist.

[28] 1969 Convention (n 1) art I(4)(f). A similar provision appears as an exclusion clause in the 1951 Convention, in which context the 'serious non-political crime' must obviously have been committed *prior to* admission to the country of asylum.

[29] ibid art I(4)(g).

nationality'.[30] Nor does the 1969 Convention provide for the cessation of a stateless person's refugee status if the circumstances in the country of former habitual residence on which such status was based cease to exist.[31]

An additional exclusion clause[32] adds 'acts contrary to the purposes and principles of' the OAU.[33] A further difference is that the 1969 Convention does not include a provision like the 1951 Convention's article 1E exclusion clause, which prevents the 1951 Convention from applying to 'a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country'. The reason why the 1951 Convention's article 1E does not appear in the 1969 Convention is clear. The article 1E exclusion clause was included in the 1951 Convention to cover ethnic Germans who fled to the Federal Republic of Germany, where the constitution recognized them as possessing the rights and obligations attached to German nationality.[34] They were therefore seen as not in need of

[30] 1951 Convention (n 22) art 1C(5); under the language of this provision, the exemption from cessation applies only to article 1A(1) refugees, however '[a]pplication of the "compelling reasons" exception is interpreted to extend beyond the actual words of the provision to apply to Article 1A(2) refugees' (UNHCR, 'Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)' (10 February 2003) para 21). The absence of the exemption from cessation from the 1969 Convention is addressed in chapter 4, section D.1.

[31] 1951 Convention (n 22) art 1C(6).

[32] The 1951 Convention's article 1F exclusion clauses provide that the 1951 Convention shall not apply to 'any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity … (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the' UN.

[33] 1969 Convention (n 1) art I(5)(c).

[34] Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 161. In the modern context, UNHCR explains that '[t]his exclusion clause may only apply if the applicant has taken up regular or permanent residence in a country, and if the status given to him or her by that country means that he or she effectively enjoys the rights and obligations of its own nationals', and that it is 'of crucial importance that the status provides protection against *refoulement* as well as

international protection. Because no analogous situation existed in Africa when the 1969 Convention was drafted, it would not have made sense for the 1969 Convention to include an article 1E-like provision.

Finally, the sixth paragraph of article I mandates the 'Contracting State of Asylum' to determine refugee status. This allocation of responsibility for RSD is remarkable because it is without parallel in the 1951 Convention, yet this is rarely, if ever, noted in analyses of the 1969 Convention.

Article II of the 1969 Convention relates to asylum, including innovative paragraphs on the nature of asylum[35] and states parties' responsibilities in relation to it,[36] *non-refoulement*,[37] responsibility sharing[38] and temporary protection;[39] each of these paragraphs is addressed in detail in chapter 3. The second article also requires that, '[f]or reasons of security', contracting states shall 'as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin'.[40]

Article III, titled the 'Prohibition of Subversive Activities', articulates refugees' duty to respect the laws and regulations of the host state,[41] repeating article

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the right to return, re-enter, and remain in the country where the person concerned has taken residence' (UNHCR, 'Self-Study Module on Refugee Status Determination' (UNHCR 2005) 73).

[35] 1969 Convention (n 1) art II(2).

[36] ibid art II(1).

[37] ibid art II(3).

[38] ibid art II(4).

[39] ibid art II(5).

[40] ibid art II(6).

[41] ibid art III(1).

2 of the 1951 Convention,[42] and further prohibits them from engaging in subversive activities against any OAU member state.[43] States parties to the 1969 Convention undertake to support this by prohibiting refugees 'residing in their respective territories from attacking any State Member of the OAU, by any activity likely to cause tension between Member States, and in particular by use of arms, through the press, or by radio';[44] this is without parallel in the 1951 Convention. The 1969 Convention's emphasis on prohibiting subversive activities is clearly the reason for the additional cessation clause mentioned above, through which the 1969 Convention will cease to apply to any refugee who has 'seriously infringed' the instrument's 'purposes and objectives'.[45]

Article IV on non-discrimination in the application of the Convention follows article 3 of the 1951 Convention, however discrimination is prohibited on the additional grounds of nationality, membership of a particular social group and political opinion.[46] The fifth article relates to voluntary repatriation, which is addressed in detail in the next chapter.

Article VI(1) reflects article 28(1) of the 1951 Convention, which mandates contracting states to provide refugees with travel documents, however it is '[s]ubject

[42] This provides: '[e]very refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order'.

[43] 1969 Convention (n 1) art III(1).

[44] ibid art III(2).

[45] ibid art I(4)(g); see Joan Fitzpatrick, 'Current Issues in Cessation of Protection Under Article 1C of the 1951 Refugee Convention and Article I.4 of the 1969 OAU Convention' (2001) UNHCR <http://www.refworld.org/docid/3bf925ef4.html> accessed 13 January 2015, 13.

[46] The 1951 Convention prohibits discrimination on the grounds of race, religion and country of origin ((n 22) art 3).

to Article III'[47] on the prohibition of subversive activities. This implies that a state would not be required by the 1969 Convention to issue a travel document to a refugee who had engaged in subversive activities.[48] In view of article II(5) on temporary protection, article VI(2) provides, '[w]here an African country of second asylum accepts a refugee from a country of first asylum, the country of first asylum may be dispensed from issuing a document with a return clause'.[49] Article VI(3), like article 28(2) of the 1951 Convention, provides that travel documents issued under previous treaties shall be recognised as if they had been issued pursuant to the 1969 Convention.

Articles VII and VIII relate to state cooperation with the OAU and UNHCR respectively. Article VII mandates states parties to provide the OAU with information on the condition of refugees, the implementation of the 1969 Convention and any national laws, regulations or decrees relating to refugees. Article VIII(2) provides that the 1969 Convention 'shall be the effective regional complement in Africa' of the 1951 Convention. This clause is analysed in detail in chapter 4 on the relationship between the 1951 and 1969 conventions. The final seven articles are technical provisions.

The aspects of the 1969 Convention sketched above are for the most part those that mirror or vary only slightly from the 1951 Convention. However, many of

[47] 1969 Convention (n 1) art VI(1).

[48] Article I(4)(g) of the 1969 Convention—providing that the Convention shall cease to apply to any person who has seriously infringed the instrument's purposes and objectives (which clearly include the prohibition of subversive activities)—is of even greater effect: the 1969 Convention ceases to apply to any refugee who has committed subversive activities, therefore such individuals have no right to a travel document or any other benefit of the Convention.

[49] 1969 Convention (n 1) art VI(2).

the 1969 Convention's eight substantive provisions represent significant departures from the international refugee instrument. This reflects the 1969 Convention's objective, as announced by its title: to address aspects of the refugee problem singular to Africa. Indeed, Rwelamira explains that the final text of the 1969 Convention 'settled for only the specific aspects of the African refugee [problem] which were not adequately catered for under the 1951 Convention'.[50] This was not, however, the objective at the outset of the drafting process. The impetus for a regional refugee instrument and how the original objective morphed over time is the subject of the balance of this chapter; the 1969 Convention itself is analysed in more depth in the next chapter.

D. THE DRAFTING OF THE 1969 CONVENTION

Work on the issue of refugee protection in Africa began very soon after the OAU's formation, as evidenced by a 1964 resolution of the OCM's Second Ordinary Session, held in Lagos, Nigeria. The resolution established an *ad hoc* commission consisting of ambassadors to the OAU from Burundi, Cameroon, Congo-Léopoldville (now the DRC), Ghana, Nigeria, Rwanda, Senegal, Sudan, Tanganyika (now Tanzania) and Uganda (the Commission)[51] to examine '(a) the refugee problem in Africa and make recommendations to the Council of Ministers on how it can be solved; [and] (b) ways and means of maintaining refugees in their country of asylum'.[52]

[50] Medard RK Rwelamira, 'Some Reflections on the OAU Convention on Refugees: Some Pending Issues' (1983) 16 Comp & Intl LJ S Afr 155, 167.

[51] The Commission later became known as The Commission of Ten on Refugee Problems in Africa; it is discussed further in chapter 6.

[52] OAU (OCM), 'Resolution on the Problem of Refugees in Africa' (OAU Lagos 24-29 February 1964) CM/Res 19 (II).

The drafting process to which this resolution ultimately gave rise is the subject of varied and conflicting accounts, in part because, as mentioned above, there are no official *travaux préparatoires* for the 1969 Convention.[53] These accounts can essentially be divided into two categories. On the one hand are the majority of commentators, who address the 1969 Convention's drafting history only briefly and without reference to primary sources such as OAU resolutions and archival material. They tend to view the OAU's interest in a regional refugee instrument as resulting from the failure of the 1951 Convention refugee definition to reflect the causes of external displacement in Africa.[54] On the other hand is the handful of writers who have addressed the 1969 Convention's drafting in some depth.[55] Such accounts have consistently attributed the motivations behind the 1969 Convention to two factors: '[t]he first of these was the problem of subversive activities and the other the date line contained in Article 1A(2) of the 1951 Convention'.[56]

The problem of subversive activities was related to the circumstances prevailing in Africa during the early 1960s. Nyanduga explains,

> [t]he 1969 OAU Convention was adopted by African States at a time in history when the continent was gripped by the struggle for liberation, following the independence of many African States in the late 1950s and the 1960s. A considerable number of African States continued to be under colonial and foreign domination. Most of southern Africa was ruled by white racist regimes. … The struggle for independence and liberation in Africa prior to and after the creation of the OAU had forced the outflow of people from their territories escaping colonial oppression and foreign domination. While in exile, many of these people organized movements for the freedom and liberation of their countries. Freedom was won peacefully

[53] Okoth-Obbo (n 2) 86.

[54] See n 2.

[55] Holborn (n 4) 183–8; Jackson (n 4) 177–96; Okoth-Obbo (n 2) 109–12.

[56] Okoth-Obbo (n 2) 109–10.

> in many cases, while several African States won their independence through armed struggle.[57]

Such armed struggle occurred within states under colonial domination and from bases abroad. The latter gave rise to the problem of subversion: states were worried that exiled freedom fighters operating on their territories would compromise inter-state relations. At the same time, individuals fleeing colonial oppression and other new refugee-producing situations in Africa were not covered by the 1951 Convention, because it did not apply to events occurring after 1 January 1951.[58]

Concerned that 'refugees might use countries of asylum as bases from which to seek the overthrow of the regimes from which they had fled'[59] and about the applicability of the 1951 Convention to flight from events post-dating 1 January 1951, the Commission proceeded to draft its first report. Drawn up in Addis Ababa, Ethiopia, in 1964, the report contained principles that were ultimately reflected in the 1969 Convention and ended up guiding much of the OAU's action in favour of refugees.[60] The principles reflected serious concern about subversion. They included:

> 1. [r]efugees who wish to return to their countries of origin must be helped to do so under the most peaceful and normal of conditions with a view to their complete integration.
> 2. In the countries of refuge, refugees must be settled, as far as possible, a long way from the frontiers of their countries of origin, for obvious security reasons, as much for the sake of the refugees themselves as for the countries of origin and of refuge.

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[57] Bahame Tom Mukirya Nyanduga, 'Refugee Protection Under the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa' (2004) 47 German YB Intl L 85, 86.

[58] 1951 Convention (n 22) art 1A(2).

[59] UNHCR, *The State of the World's Refugees 2000: Fifty Years of Humanitarian Action* (OUP 2000) 54; see, also, OAU (OAHG), 'Declaration on the Problem of Subversion' (OAU Accra 21-25 October 1965) AHG/Res 27 (II).

[60] EM Ngung, 'The Role of Regional and Sub-Regional Organizations in Situations of Conflict and Displacement' (1999) 18 RSQ 97, 97.

> 3. The term 'refugee' will be limited to citizens of countries, the political, social, racial, or religious conditions of which have brought about a need for expatriation through fear or oppression, imprisonment or other similar difficulties.
> 4. Countries of refuge must in no case allow refugees to attack their country of origin. In the same way the countries of origin must not consider the harbouring of refugees as an unfriendly gesture, and must desist from any attack on the countries of refuge through the media or press or radio or by resorting to arms.
> 5. Countries which have a refugee problem must begin or continue bilateral negotiations, with a view to solving all the difficulties likely to arise by peaceful means and in accordance with the principles and objectives of the Organization of African Unity [including] the principle of the settlement of refugees away from the border.[61]

In addition, and perhaps most importantly, the Commission's report recommended that the OAU 'draft a special convention on the status of African refugees'.[62]

1. The first/Kampala draft convention

At its Third Ordinary Session, held in Cairo, Egypt, in July 1964, the OCM took note of the report and, further to it, invited the Commission to 'draw up a draft Convention covering all aspects of the problem of refugees in Africa'.[63] The OCM requested that the draft, once complete, be circulated by the OAU's Administrative Secretary-General to member states, with a view to considering the draft and comments thereon at its Fourth Ordinary Session. The OCM also recommended that the Commission become a permanent OAU body.[64] Thus began work on the first draft of the 1969 Convention, known as the Kampala draft, after the Commission's 1964 drafting session in the Ugandan capital.

[61] Cited in Holborn (n 4) 851–2.

[62] Holborn (n 4) 185.

[63] OAU (OCM), 'Resolution on the Commission on the Problem of Refugees in Africa' (OAU Cairo 13-17 July 1964) CM/Res 36 (III) para 6.

[64] Rachel Murray, *Human Rights in Africa: From the OAU to the African Union* (CUP 2004) 196.

The Kampala draft was largely concerned with making international refugee law applicable in Africa. Thus it 'employed the form and much of the working of the 1951 Refugee Convention, although it eliminated the dateline contained therein'.[65] Furthermore, while the draft was similar to the 1951 Convention, it was in many respects far less liberal.[66] This posed a significant problem for UNHCR. Eberhard Jahn, then Deputy Director of UNHCR's legal division, summarised his office's concerns as follows:

> there are omissions which, from the point of view of the international protection of refugees, are undesirable. The Draft does not contain any provision on such elementary rights as wage-earning employment, elementary education, public relief, labour legislation and social security. It does not stipulate freedom of movement and it makes the issuance of travel documents merely optional and gives less protection against expulsion.[67]

Similarly, in a July 1965 letter, then Deputy High Commissioner Prince Sadruddin Aga Kahn wrote,

> [w]e are concerned at possibility of African Regional Convention which departs from universal 1951 Convention and provides substantially lesser standard of treament for African refugees as for example on wage earning employment and expulsion. … Moreover believe present draft would seriously jeopardise protocol or other instrument to extend effects 1951 Convention to post dateline refugees.[68]

Most concerning was perhaps draft article 31, which provided that the African refugee convention would supersede all preceding bilateral and multilateral agreements relating to refugees.[69] Holborn explains that 'the emergence of an

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[65] Philip E Chartrand, 'The Organization of African Unity and African Refugees: A Progress Report' (1975) 137 World Aff 265, 270.

[66] Holborn (n 4) 186.

[67] Eberhard Jahn, 'Development in Refugee Law in the Framework of Regional Organizations Outside Europe' (1966) 4 Association for the Study of the World Refugee Problem Bulletin 77, 82.

[68] Letter dated 14 July 1965, UNHCR archives, fonds 1/5/11/1.

[69] UNHCR memo dated 29 April 1965, UNHCR archives, fonds 1/5/11/1.

instrument which in any sense superseded or competed with the 1951 Convention would seriously impair the universal character of the Convention which the UNHCR had spent years fostering'.[70] This concern is reflected in a 1965 letter from UNHCR's representative in Tanzania to the Deputy High Commissioner, which warns that 'if the 1951 Convention was denounced by the African states, a refugee from an African state would have more rights in a European country than in an African brother country, which could hardly be the intention of the OAU'.[71]

UNHCR shared its concerns about the Kampala draft with OAU officials—notably Assistant Secretary-General Mohamed Sahnoun—and member states, encouraging the latter to transmit comments reflective of them.[72] UNHCR also moved to make an all-encompassing regional instrument unnecessary. Indeed, '[t]he High Commissioner's interest in seeking the rapid adoption of the [1967] Protocol was partly stimulated by the efforts of the [OAU] member states … to draft their own regional convention on refugees'.[73] Thus while the OAU was working on an African refugee convention, UNHCR convened the Bellagio Colloquium, the work of which ultimately led to the adoption of the 1967 Protocol.[74]

The Kampala draft was presented to the OCM at its Fourth Ordinary Session, held in Nairobi, Kenya, in February and March 1965. Likely prompted by the member state comments UNHCR had encouraged, the Council ultimately shared

[70] Holborn (n 4) 185.

[71] Letter dated 5 July 1965, UNHCR archives, fonds 1/5/11/1.

[72] UNHCR memo dated 21 May 1965, UNHCR archives, fonds 1/5/11/1.

[73] UNHCR (n 59) 56.

[74] Holborn (n 4) 185–6.

UNHCR's view that the Kampala draft suffered serious shortcomings. Accordingly, it established a committee of legal experts (the Committee of Legal Experts) to revise it.[75] The experts were nominated by the ten states represented on the Commission and were instructed to meet prior to 30 July 1965 in order to have a revised draft convention ready for consideration at the OCM's Fifth Ordinary Session.

2. The second/Léo draft convention

OAU Assistant Secretary-General Sahnoun suggested that UNHCR provide the Committee of Legal Experts with a draft convention to serve as a basis for its work. A memorandum by UNHCR's Jahn titled 'Action to be taken by the Legal Division in connection with the Draft Convention relating to the Status of Refugees in Africa' explains,

> Ambassador Sahnoun thought that since the Draft Convention relating to the Status of Refugees in Africa as it now stands [the Kampala draft], appears neither to meet the aims for which such an instrument was first envisaged by the OAU, nor to be in full harmony with the world-wide 1951 Convention, it would be preferable that the Committee of Legal Experts, when it meets in July 1965, does not adopt this Draft Convention. He rather had in mind a legal instrument much more concise and much more specifically relevant to Africa; he described a 'Protocole d'Accord' which should regulate relations between Member States with regard to refugee problems in Africa; it should inter alia deal with asylum (not a hostile act), with the obligations of refugees and of asylum countries, with the problem of voluntary repatriation, with the possibility of settling problems between Member States in conformity with Article XIX of the OAU Charter.[[76]] … Ambassador Sahnoun said he would be very pleased if, on a very confidential basis, we could prepare for him a draft of such a Protocol which, after careful study by the Secretariat, could be proposed to the

[75] OAU (OCM), 'Resolution on the Problem of Refugees' (OAU Nairobi 26 February-9 March 1965) CM/Res 52 (IV) para 3.

[76] This provides for the establishment of a Commission of Mediation, Conciliation and Arbitration, which member states pledge to use 'to settle all disputes among themselves by peaceful means'.

> Committee of Legal Experts and to the Member States as a OAU Secretariat paper.[77]

Assistant Secretary-General Sahnoun's proposal seems to be the first suggestion that the African refugee convention should not duplicate its international counterpart, but rather should address refugee issues particular to Africa. Sahnoun's proposed document was produced by UNHCR and annexed to a 'Note Submitted by the United Nations High Commissioner for Refugees on Measures Being Examined Within the Framework of the Organization of African Unity for Regulating Refugee Problems Between Member States'.[78] However, according to UNHCR's representative in Léopoldville (now Kinshasa), DRC—where the Committee of Legal Experts met in July 1965—'under the prevailing circumstances, it was completely impossible' to have the UNHCR draft adopted.[79] Indeed, the draft that emerged from the Léopoldville meeting—known as the Léo draft—was far from the *Protocole d'Accord* suggested by Sahnoun and provided by UNHCR.

Rather, the Léo draft 'largely followed … the 1951 United Nations Refugee Convention, although the various standards of treatment provided for were not the same'.[80] Specifically, it contained a refugee definition, which reproduced the 1951 Convention definition without the dateline (article 1), and provisions concerning: the general obligations of refugees (article 2); the prohibition of subversive activities (article 3); non-discrimination (article 4); religion (article 5); rights granted apart from the convention (article 6); the term 'in the same circumstances' (article 7);

[77] Memo dated 15 May 1965, UNHCR archives, fonds 1/5/11/1.

[78] Dated June 1965, UNHCR archives, fonds 1/5/11/1.

[79] Memo dated 21 July 1965, UNHCR archives, fonds 1/5/11/1.

[80] Jackson (n 4) 180.

exemption from reciprocity (article 8); exemption from exceptional measures (article 9); provisional measures (article 10); residence prior to the Convention (article 11); refugee seamen (article 12); personal status (article 13); moveable and immovable property (article 14); artistic rights and industrial property (article 15); right of association (article 16); access to courts (article 17); wage-earning employment and self-employment (article 18); liberal professions (article 19); identity papers (article 20); travel documents (article 21); fiscal charges (article 22); transfer of assets (article 23); refugees unlawfully in the country of refuge (article 24); expulsion (article 25); prohibition of expulsion or return (article 26); naturalisation (article 27); and executory and transitory provisions (articles 28 to 38).[81]

> With these provisions, the Léo draft
>
> > came closer to the wording of the 1951 Convention but still failed to win OAU approval because, in the eyes of many OAU members, it on the one hand, overlapped with the 1951 Convention and, on the other, was still far less liberal than the 1951 Convention since it reduced its standards.[82]

In the words of Assistant Secretary-General Sahnoun, '*l'impression qui se dégage ici de plus en plus, est qu'en fait la convention adoptee à Léopoldville est encore moins libérale que la convention générale*'.[83] Similarly, UNHCR's view of the Léo draft—like its opinion of the earlier Kampala draft—was that it would 'dangerously impair the universal value of the principles of the 1951 Convention, and would hinder efforts currently being undertaken to extend the Convention's scope'.[84]

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[81] Léopoldville draft, UNHCR archives, fonds 1/5/11/1.

[82] Chartrand (n 65) 270.

[83] Author's translation: the impression increasingly coming out of this is that, in fact, the convention adopted in Léopoldville is even less liberal than the general convention (Letter dated 27 July 1965, UNHCR archives, fonds 1/5/11/1).

[84] Jackson (n 4) 181.

With the OAU secretariat, many OAU member states and UNHCR in agreement about the Léo draft's shortcomings, the two organisations worked together to move the drafting process forward. The OAU's Administrative Secretary-General prepared a report for the October 1965 OAHG meeting in Accra, Ghana, highlighting the concerns his organisation and UNHCR shared. With the benefit of the OAU report, the OAHG rejected the Léo draft and requested that the Commission 'provide legal experts at the highest level possible to re-examine the draft OAU convention on the status of refugees having regard to the views expressed by the Assembly at its present session and to report back to the Assembly'.[85] The OAHG also requested that OAU member states that had not already done so 'ratify the United Nations Convention relating to the Status of Refugees and … apply meanwhile the provisions of the said Convention to refugees in Africa'.[86]

According to Jackson, this request 'can be taken as the first clear indication that the African refugee convention should not cover the same ground as the 1951 Convention, the overriding character of which was implicitly recognised'.[87] Similarly, the High Commissioner for Refugees explained in his October 1965 statement to UNHCR's Executive Committee (ExCom) that most delegations at the Accra meeting had agreed that instead of creating a convention 'covering all aspects of the problem of refugees in Africa', the OAU should 'recognise the universal principles of the 1951 Convention and supplement the latter with a view to regulating

[85] OAU (OAHG), 'Resolution on the Problem of Refugees in Africa' (OAU Accra 21-25 October 1965) AHG/Res 26 (II) para 6.

[86] ibid; this call was reiterated several times, next in OAU (OCM), 'Resolution on the Problem of Refugees in Africa' (OAU Kinshasa 4-10 September 1967) CM/Res 104 (IX) para 1.

[87] Jackson (n 4) 182.

certain aspects of the refugee problems peculiar to the region in particular in so far as they concern relations between member states'.[88] Thus Assistant Secretary-General Sahnoun's view that the regional instrument should not duplicate its international counterpart, but rather should address refugee problems particular to Africa, was gaining support.

3. The third/Addis Ababa draft convention

Despite the consensus that emerged in Accra, the third draft convention, known as the Addis Ababa draft after the Committee of Legal Experts' September 1966 meeting in Ethiopia, 'still tended to cover the same ground as the 1951 Convention, though its provisions were more liberal than those of the preceding drafts and it contained new articles felt to be essential for dealing with the refugee situations in Africa'.[89] Jackson describes the Addis Ababa draft as being shorter than its predecessor because a number of the Léo draft's provisions corresponding to articles in the 1951 Convention were omitted.[90] Such provisions were no longer necessary because the Addis Ababa draft contained a preliminary conflict clause providing,

> (1) [i]n all matters relating to the status, condition and treatment of refugees Member States shall, save as hereinafter provided, apply the provisions of the convention relating to the status of Refugees signed in Geneva on 28 July 1951, irrespective of the dateline and of any geographical limitation. (2) Should the provisions of this Convention conflict with any of those of the Convention of 28 July 1951, the provisions of this Convention shall prevail.[91]

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[88] UNHCR, 'Statement by the High Commissioner to the 15th Session of the Executive Committee of the High Commissioner's Programme' (29 October 1965) A/AC.96/310, 1.

[89] Holborn (n 4) 187.

[90] Jackson (n 4) 182.

[91] Cited in Jackson (n 4) 183.

The Addis Ababa draft went on to provide a refugee definition replicating that of the 1951 Convention and including a second clause outlining factors to consider in determining whether the African convention would apply *prima facie* to groups of refugees. Other provisions related to asylum (article III); general obligations (article IV); the prohibition of subversive activities (article V); extradition (article VI); rights granted apart from the Convention (article VII); repatriation (article VIII); wage-earning and self-employment (article IX); liberal professions (article X); identity papers (article XI); travel documents (article XII); co-operation of the national authorities with the OAU and UNHCR (article XIII); and settlement of disputes (article XIV). Like the Kampala and Léo drafts before it, the Addis Ababa draft failed to win OCM support.[92]

4. The fourth/OAU Secretariat draft convention

At its Seventh Ordinary Session, held in October and November 1966 in Addis Ababa, the Council handed the job of drafting the African refugee convention over to the OAU Secretariat.[93] It also expressed in no uncertain terms the consensus that had begun to emerge from the Accra OAHG, noting its desire 'that the African instrument should govern the *specifically African aspects of the refugee problem* and that it should come to be the *effective regional complement* of the 1951 … Convention'.[94] This approach was inspired in part by the fact that by the time of the OCM's Seventh Ordinary Session, the 1967 Protocol was well on its way to adoption, meaning that

[92] Holborn (n 4) 187.

[93] OAU (OCM), 'Resolution on the Adoption of a Draft Convention on the Status of Refugees in Africa' (OAU Addis Ababa 31 October-4 November 1966) CM/Res 88 (VII) para 2.

[94] ibid, preambular para 6 (emphasis added).

the 1951 Convention would soon be applicable in Africa.[95] Holborn describes the Council's Seventh Ordinary Session as 'a turning point in the drafting of the OAU Convention; from then on drafts almost totally omitted any reference to matters already covered in the 1951 Convention and concentrated instead on matters particularly affecting refugees in Africa'.[96]

The OAU Secretariat presented its draft convention, now the fourth to come before the OCM, to the body's Ninth Ordinary Session, held in Kinshasa, DRC, in September 1967. By this time, the 1967 Protocol had received three of the six accessions it needed to enter into force.[97] The imminent applicability of the 1951 Convention in Africa did not, however, obviate the need for a regional instrument. OAU member states agreed in Kinshasa that the regional convention remained necessary in order to address refugee situations specific to Africa.[98] Furthermore, certain African states—notably Nigeria and Uganda—were critical of the 1967 Protocol because, while it removed the 1951 Convention's temporal limitation, it failed to address refugee protection concerns particular to their region.[99] Thus 'African efforts to elaborate a separate UN instrument dealing with refugees were channelled into the adoption of a complementary regional instrument'.[100] Yet while it was agreed that an African refugee convention remained necessary, the Council did

[95] Okoth-Obbo (n 2) 110.

[96] Holborn (n 4) 187.

[97] ibid 188.

[98] ibid.

[99] Sara E Davies, 'Redundant or Essential? How Politics Shaped the Outcome of the 1967 Protocol' (2007) 19 IJRL 703, 724–5.

[100] Frans Viljoen, *International Human Rights Law in Africa* (2nd edn, OUP 2012) 242.

not accept the OAU Secretariat's draft in Kinshasa, and the Committee of Legal Experts was sent back to work on what would be the fifth, and final, draft of the regional refugee convention.

5. The fifth/final draft convention

An important source of inspiration for the Committee of Legal Experts in its final push on the convention—especially regarding the refugee definition—was the October 1967 Conference on the Legal, Economic and Social Aspects of African Refugee Problems,[101] convened in Addis Ababa by the Dag Hammarskjöld Foundation, the OAU, the United Nations Economic Commission for Africa (ECA) and UNHCR. The conference report[102] contained 13 official recommendations, five of which 'were directed at legal aspects of African refugee problems and were to have an important effect upon the shaping of the OAU Refugee Convention during the final stage of its drafting'.[103]

One of the conference's 13 recommendations 'was the first occasion on which the view was officially expressed that the 1951 Convention definition—while universally applicable—might not be sufficient to cover all refugee situations in Africa'.[104] Egypt had made this point unofficially earlier, at a 1964 Cairo meeting of

[101] Lars-Gunnar Eriksson, Goran Melander and Peter Nobel, *An Analysing Account of the Conference on the African Refugee Problem, Arusha, May 1979* (Scandinavian Institute of African Studies 1981) 11; Richard Greenfield, 'The OAU and Africa's Refugees' in Yassin El-Ayouty and I William Zartman (eds), *The OAU After Twenty Years* (Praeger 1984) 222.

[102] UNECA and others, 'Final Report of the Conference on the Legal, Economic and Social Aspects of the African Refugee Problems' December 1968 (on file with the author).

[103] Chartrand (n 65) 276.

[104] Jackson (n 4) 187.

the Asian-African Legal Consultative Committee (AALCC). There, Egypt expressed reservations about the inability of the 1951 Convention's refugee definition to cover those fleeing their country for generalised reasons.[105] The Egyptian delegation to the 1967 conference, supported by several others, followed up on its 1964 position, specifically requesting that the refugee definition apply to individuals obliged to flee from their country due to aggression or subversion coming from outside their homeland.[106]

The Egyptian request resulted in recommendation II of the 1967 conference, which advised African countries that a new definition should be found for the term 'refugee', taking into account the specific aspects of the refugee situation in Africa.[107] Such 'specific aspects' were largely the result of persistent colonial domination and minority rule on the continent:

> the question of whether the African Convention extends protection to persons engaged in military struggle remains a controversial one. ... This issue was discussed at length at the Conference on the Legal, Economic and Social Aspects of African Refugee Problem held in Addis Ababa in 1967. General consensus existed that the question of freedom fighters was intricately linked to the question of subversion. While support of freedom fighters intent on overthrowing a government of an independent African state could not conceivably be condoned in any way, it was accepted unreservedly that in a spirit of African solidarity it was the duty of every African country to assist freedom fighters who were fighting for the liberation of the African continent from colonial or racial domination. Such persons had no duty to abstain from activities aimed at overthrowing the internal structures in these colonial or minority-regime dominated countries. At any rate, African solidarity and the principles of the OAU as expressed in its Charter, clearly state that in seeking freedom for the African Continent, it is legitimate, indeed imperative to assist liberation movements.

[105] ibid 186; the AALCC's refugee work is described in Eberhard Jahn, 'The Work of the Asian-African Legal Consultative Committee on the Legal Status of Refugees' (1967) 27 Heidelberg J Intl L 122.

[106] Jackson (n 4) 189.

[107] ibid.

> It was against this background that Article 1(2) was added to the general refugee definition taken from the 1951 Convention.[108]

At its Tenth Ordinary Session, held in Addis Ababa in February 1968, the OCM took note of the conference report and drew the attention of member states and of the OAU's Administrative Secretary-General to its recommendations.[109]

The Committee of Legal Experts met in Addis Ababa in June 1968 to produce the fifth draft convention. The OAU Secretariat provided a report with a second Secretariat-produced draft annexed thereto, to serve as a basis for the Committee's work.[110] In light of the 1967 conference's second recommendation and the OCM's endorsement of it, this Secretariat draft included the 1951 Convention refugee definition plus a second part in which 'external aggression and occupation, foreign domination or internal subversion'[111] were grounds for refugee status. The Secretariat draft also included a clause governing the regional instrument's relationship to the 1951 Convention, which provided:

> [i]n accordance with Resolution OAHG/Res.26, Member States shall, save as herein provided, apply the provisions of the U.N. Convention of 26 July 1951 relating to the status of refugees, irrespective of the dateline and of any geographical limitation as provided in the Protocol on the Status of Refugees of 31 January 1967.[112]

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[108] Rwelamira (n 50) 169.

[109] OAU (OCM), 'Resolution on the Problem on Refugees in Africa' (OAU Addis Ababa 20-24 February 1968) CM/Res 141 (X) para 2.

[110] 'Report of the Administrative Secretary-General for the Meeting of the OAU Commission on Refugees Held in Addis Ababa from 17th to 23rd June 1968', UNHCR archives, fonds 1/5/11/1.

[111] ibid; the Secretariat's draft definition as a whole provided, '[t]he term 'refugee' shall also apply to every person who, owing to external aggression and occupation, foreign domination or internal subversion on a part of or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence whether inside or outside his country of nationality in order to seek refuge in another place within or outside his country of origin or nationality'.

[112] OAU (n 110) art IX(2).

The Committee of Legal Experts maintained the Secretariat's draft with only minor revisions, including to the second part of its refugee definition. Specifically, it replaced the word 'subversion' with 'disorder', considering 'subversion' to be ambiguous,[113] and abandoned the Secretariat draft's concept that someone could become a refugee within his or her own country.[114] The clause relating to the relationship between the regional instrument and its global counterpart was also amended to read, 'Member States shall apply the provisions of the United Nations Convention of 28 July 1951 relating to the Status of Refugees, as modified by the Protocol on the Status of Refugees of 31 January 1967',[115] thereby eliminating the words 'save as herein provided', which would have made the regional instrument supreme in specified instances.[116]

At its Eleventh Ordinary Session, held in Algiers, Algeria, in September 1968, the OCM requested that 'Member States, who have not yet done so, … communicate to the General Secretariat before 15 December 1968 their comments on the OAU draft Convention on the Problem of Refugees'.[117] In February 1969, once such

[113] Jackson (n 4) 190; presumably 'disorder' somehow became article I(2)'s 'events seriously disturbing public order', though no information was found about this.

[114] See n 111. The draft definition adopted by the Committee of Legal Experts provided, '[t]he term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or internal disorder affecting either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality' ('Draft OAU Convention Governing the Specific Aspects of the Problem of Refugees in Africa', UNHCR archives, fonds 1/5/11/1).

[115] 'Draft OAU Convention Governing the Specific Aspects of the Problem of Refugees in Africa', UNHCR archives, fonds 1/5/11/1, art VIII(2).

[116] No clause explicitly specifying that the 1951 Convention should be applied ultimately made its way into the version of the regional instrument that was adopted in 1969. Instead, the 1969 Convention recognises the 1951 Convention as 'the basic and universal instrument relating to the status of refugees' (preambular para 9) and calls on OAU member states to acceded to it and the 1967 Protocol and to 'meanwhile apply their provisions to refugees in Africa' (preambular para 10).

[117] OAU (OCM), 'Resolution on the Problem of Refugees in Africa' (OAU Algiers 4-12 September 1968) CM/Res 149 (XI) para 1.

comments had been received, the Committee of Legal Experts presented its final draft to the OCM, for what was by then the Council's fifth consideration of a draft African refugee convention. This time, however, the document won the OCM's unanimous support, and was signed by 41 African states on 10 September 1969.[118] It entered into force upon ratification by one-third of OAU member states[119] on 20 June 1974, a day that has since been celebrated as Africa Refugee Day[120] and later also became World Refugee Day.

To date, the 1969 Convention has been ratified by 45 of the AU's 54 member states. Eritrea, the Saharawi Arab Democratic Republic (SADR),[121] Sao Tomé & Principe and South Sudan have neither signed nor ratified the 1969 Convention. Djibouti, Madagascar, Mauritius, Namibia and Somalia have signed but not ratified the 1969 Convention. Morocco is party to the 1969 Convention, however it withdrew from the OAU in 1985 when SADR was admitted as a member state. The 1951 Convention is even more widely supported in Africa. Only the Comoros, Eritrea, Libya, Mauritius and South Sudan have neither signed nor ratified the 1951 Convention or its 1967 Protocol. Madagascar is a party to the 1951 Convention but not the 1967 Protocol, and it and the Republic of Congo continue to recognise the 1951 Convention's European geographical limitation.[122] Cape Verde is party to the

[118] Chartrand (n 65) 271.

[119] 1969 Convention (n 1) art XI.

[120] OAU (OCM), 'Resolution on Africa Refugee Day' (OAU Addis Ababa 13-21 February 1975) CM/Res 398 (XXIV).

[121] SADR's statehood is contested, however it is a member of the AU.

[122] Articles 1B(1) and 1B(2) of the 1951 Convention allow states to opt out of its geographical limitation upon signature, ratification or accession, or subsequently by notifying the UN Secretary General.

1967 Protocol but not the 1951 Convention. How states parties have given effect to the 1969 Convention, its regional refugee definition in particular, is covered in chapter 4.

E. CONCLUSIONS

The most important aspect of this legal history for contemporary understandings of the 1969 Convention is certainly its elucidation of the various objectives that underpinned the Convention. The project to draft a regional refugee instrument was initially aimed at addressing the problem of subversion and making international refugee law applicable in Africa. Particularly persuasive in respect of the latter is that early drafts of the 1969 Convention included only the 1951 Convention refugee definition (without the dateline); dissatisfaction with the international refugee definition was simply not an initial factor motivating the adoption of a regional instrument.[123] Once the 1967 Protocol was adopted, the principal objective of the regional Convention became addressing refugee issues particular to Africa. Subversion remained chief among these,[124] but other considerations, such as the definitional issue, also arose.[125] Thus van Garderen and Ebenstein's characterisation of the motivations behind the 1969 Convention reflects the historical record sketched here if it is understood sequentially, with the first two objectives they note preceding the third:

> [t]he principle [*sic*] objective of the OAU Refugee Convention is to ensure the security and peaceful relations among OAU member States, particularly

[123] Jackson also makes this point ((n 4) 181).

[124] See 1969 Convention (n 1) art III.

[125] See 1969 Convention (n 1) art I(2).

> in cases where the presence of refugees causes inter-State tension. The second objective was to complement the 1951 Convention with its temporal and geographical [*sic*] limitations.[126] Finally, the drafters intended to address the refugee challenges peculiar to Africa. The concern was that the 1951 Convention did not include refugees displaced from countries ruled by colonial powers and white racist regimes.[127]

This third objective of addressing refugee challenges particular to Africa explains why the Convention emerged as it did. The 1969 Convention is a very succinct instrument, addressing refugee issues particular to Africa and *only* refugee issues particular to Africa. This feature is critical to understanding the 1969 Convention, to which the next chapter is devoted, and to understanding the relationship between the 1951 and 1969 conventions, which is the subject of chapter 4.

[126] There was never any geographical limitation preventing the 1951 Convention from applying in Africa (see n 122).

[127] Jacob van Garderen and Julie Ebenstein, 'Regional Developments: Africa' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (OUP 2011) 188.

CHAPTER 3

THE 1969 CONVENTION

A. INTRODUCTION

As a refugee protection crisis continues to prevail in Africa, the 1969 Convention[1] remains largely beyond serious scrutiny. Understandably, in the wake of the Convention's adoption, attention focused on its remarkable legal innovations.[2] However, almost half a century later, amid falling standards of refugee protection in Africa[3] and a decline in the priority accorded to refugee protection by African states,[4] the discussion has scarcely moved on. When it receives any attention at all—which usually occurs around significant anniversaries[5]—the 1969 Convention is either uncritically praised[6] or analysis remains focused on its novelties,[7] in particular the

[1] Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45.

[2] See Ousmane Goundiam, 'African Refugee Convention' [1970] Migr News 3; Paul Weis, 'The Convention of the Organization of African Unity Governing the Specific Aspects of Refugee Problems in Africa' (1970) 3 Revue des droits de l'homme 449.

[3] See chapter 1.

[4] Ademola Abass and Dominique Mystris, 'The African Union Legal Framework for Protecting Asylum Seekers' in Ademola Abass and Francesca Ippolito (eds), *Regional Approaches to the Protection of Asylum Seekers: An International Legal Perspective* (Ashgate 2014) 20.

[5] See, for example, George Okoth-Obbo, 'Thirty Years On: A Legal Review of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa' (2001) 20 RSQ 79; Joe Oloka-Onyango, 'Human Rights, the OAU Convention and the Refugee Crisis in Africa: Forty Years After Geneva' (1991) 3 IJRL 453; Micah Bond Rankin, 'Extending the Limits or Narrowing the Scope? Deconstructing the OAU Refugee Definition Thirty Years On' (2005) 21 S Afr J Hum Rts 406; MR Rwelamira, 'Two Decades of the 1969 OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa' (1989) 1 IJRL 557; Ray Wilkinson, 'Thirty Years After...The OAU Refugee Convention was a Model of Generosity, but Times Have Changed' [1999] Refugees 4.

[6] Rankin (n 5) 410. See, for example, Jennifer L Turner, 'Liberian Refugees: a Test of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa' (1994) 8 Geo Immigr LJ 281.

regional refugee definition, at the expense of critical analysis of the overall protection framework the Convention establishes.[8] Africa is the only region of the developing world to have adopted a binding regional refugee legal instrument and it hosts over a quarter of the world's refugees,[9] yet the 1969 Convention remains poorly understood or misunderstood.[10]

This and the following chapter contribute to remedying this problem. They are characterised by their alternative approach. While recognising the 1969 Convention's significant contributions to refugee protection in Africa, they focus equally on what the 1969 Convention is not—in terms of both widely held misconceptions about it (this chapter) and omissions from it (chapter 4)—as opposed to the usual approach that focuses almost exclusively on what the 1969 Convention is.

This chapter begins by critically surveying the elements of the 1969 Convention that are commonly hailed as its major legal innovations: the Convention's regional refugee definition; its progressive development of an individual right to asylum; the broadened nature of *non-refoulement* under the Convention; and its formalisation of responsibility sharing, a type of temporary protection and voluntary repatriation. The chapter then goes on to address the most misunderstood of these innovations—the regional refugee definition—in greater depth, with an emphasis on

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[7] See, for example, Chris J Bakwesegha, 'The OAU and African Refugees' in Yassin El-Ayouty (ed), *The Organization of African Unity after Thirty Years* (Greenwood Publishing Group 1994); Rainer Hofmann, 'Refugee Law in the African Context' (1992) 52 Heidelberg J Intl L 318.

[8] Pieces by Okoth-Obbo (n 5), Edwards (Alice Edwards, 'Refugee Status Determination in Africa' (2006) 14 Afr J Intl Comp L 204) and Rankin (n 5) are notable exceptions.

[9] UNHCR, *UNHCR Statistical Yearbook 2013* <http://www.unhcr.org/54cf9bd69.html> accessed 9 June 2015, 7.

[10] Edwards (n 8) 207; Rankin (n 5) 407 & 415.

dispelling the most common misconception surrounding the definition: that it is much broader than the refugee definition found in the 1951 Convention.[11] The following chapter then investigates a glaring yet often overlooked omission: the 1969 Convention's silence regarding refugees' civil and political and socio-economic rights, and how the 1969 Convention works as the 'regional complement'[12] to the universal refugee instrument in that regard. Taken together, this and chapter 4's discussion of the innovations in, misconceptions about and omissions from the 1969 Convention provides a unique critical overview of the refugee law component of the African refugee protection regime.

The critical approach adopted here should not be taken to suggest that the 1969 Convention should be interpreted in any way other than in good faith and in line with its object and purpose,[13] the humanitarian nature of which is made explicit by the Convention's preamble.[14] Rather, the overarching purpose of this chapter—and indeed this work—is to move towards more serious, critical legal engagement with the 1969 Convention and with refugee protection in Africa more generally. There is a remarkable dearth of critical legal analysis of the 1969 Convention,[15] which is all the more stark in relation to the sheer volume of analysis to which the 1951 Convention

[11] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art 1A(2).

[12] 1969 Convention (n 1) art VIII(2).

[13] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31(1).

[14] Preambular paragraph 1 notes 'with concern the constantly increasing numbers of refugees in Africa', and is 'desirous of finding ways and means of alleviating their misery and suffering as well as providing them with a better life and future'. Preambular paragraph 2 recognises 'the need for an essentially humanitarian approach towards solving the problems of refugees'.

[15] Edwards (n 8) 207; Rankin (n 5) 407 & 415.

has been subject.[16] Serious academic analysis of the 1969 Convention is a critical component of full engagement with it as a tool of refugee protection. Indeed, Rankin maintains that the failure to provide an interpretive framework for the 1969 Convention 'may ultimately undermine the flexibility of the [refugee] definition by limiting the situations in which it can be applied'.[17] If the 1969 Convention begins to receive even a fraction of the critical attention that has been devoted to its universal counterpart, it will represent an important contribution to the legal protection of refugees in Africa at a time when such a contribution is sorely needed.

B. INNOVATIONS

1. A regional refugee definition

The 1951 Convention defines a refugee as someone with a well-founded fear of persecution on the basis of his or her race, religion, nationality, membership of a particular social group or political opinion.[18] As discussed in chapter 2, the 1969

[16] See, for example, Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge From Deprivation* (CUP 2007); Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007); Atle Grahl-Madsen, *The Status of Refugees in International Law*, vol 1 & 2 (Sijthoff 1966); James C Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, CUP 2014); Paul Weis, 'Legal Aspects of the Convention of 25 July 1951 relating to the Status of Refugees' (1953) 30 B YB Intl L 478; Andreas Zimmermann (ed) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011).

[17] Rankin (n 5) 415.

[18] 1951 Convention (n 11) art 1A(2), which provides that the term 'refugee' shall apply to any person who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence [as a result of such events], is unable or, owing to such fear, is unwilling to return to it'. (The words in square brackets are related to the 1951 Convention's dateline. They and the dateline itself were removed by article I(2) of the 1967 Protocol (see n 20).)

Convention includes that same definition[19]—minus the 1 January 1951 date limit in the 1951 Convention that most states later agreed, by way of the 1967 Protocol,[20] not to apply—and provides at article I(2),

> [t]he term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

This definition is addressed at length below, as part of the analysis of common misconceptions surrounding it,[21] while the relationship between the international and regional refugee definitions (and, more generally, between the 1951 and 1969 conventions) is the subject of chapter 4. For the moment, it suffices to note that in moving away from the 1951 Convention's emphasis on individualised persecution linked to enumerated grounds in favour of a focus on disruptive conditions in the country of origin or nationality, the article I(2) refugee definition stresses protection from what might be more broadly applicable conditions. In other words, article I(2) 'requires neither the elements of deliberateness nor discrimination inherent in the 1951 Convention definition'.[22]

It is also noteworthy that article I(2) has been globally influential, in three significant respects. First, it informed the language of the 1984 Cartagena Declaration, which recommended that the traditional refugee definition be expanded

[19] 1969 Convention (n 1) art I(1).

[20] Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267, art I(2).

[21] See section C.

[22] Ruma Mandal, 'Protection Mechanisms Outside the 1951 Convention ("Complementary Protection")' (2005) UNHCR Legal and Protection Policy Research Series <http://www.unhcr.org/435df0aa2.pdf> accessed 8 December 2010, 13.

in Latin America to include 'persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order'.[23]

Second, UNHCR's ExCom concluded in 1981 that the 1951 Convention refugee definition should be broadened to take account of mass displacement, and in so doing used—without attribution—the wording of the 1969 Convention's article I(2).[24] According to the High Commissioner's report to the UN General Assembly, ExCom concluded,

> the measures of protection … should extend both to persons who are refugees within the traditional refugee definition as well as to persons meeting 'wider' criteria, i.e., persons who are compelled to seek refuge outside their country of origin because of external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of that country.[25]

Finally, article I(2) has influenced how the High Commissioner's competence is described. Successive UN General Assembly and Economic and Social Council resolutions have extended UNHCR's competence beyond just the class of individuals covered by the 1951 Convention refugee definition.[26] Former High Commissioner Sadako Ogata acknowledged in 1994 that this iterative process meant that 'the

[23] Cartagena Declaration on Refugees (22 November 1984) in 'Annual Report of the Inter-American Commission on Human Rights' OAS Doc OEA/Ser.L/V/II.66/doc.10, rev.1, 190–193 (1984–1985) section III.3.

[24] Richard Greenfield, 'The OAU and Africa's Refugees' in Yassin El-Ayouty and I William Zartman (eds), *The OAU After Twenty Years* (Praeger 1984) 224; see chapter 4, section C.1 on ExCom Conclusion 22, which also uses the language of the 1969 Convention's article I(2), but in the context of minimum standards of treatment in mass influx.

[25] UNGA, 'Report of the United Nations High Commissioner for Refugees' (18 August 1982) 37th Session (1982) UN Doc Supp No 12 (A/37/12) para 13.

[26] See, for example, UNGA, Res 48/118 (20 December 1993); UNGA, Res 3143 (XXVIII) (14 December 1973); ECOSOC, Res 2011 (LXI) (2 August 1976).

terminology employed for refugees who may not come within the terms of the 1951 Convention definition (and that in the UNHCR Statute) is neither consistent nor clear'.[27] To clarify the scope of her mandate, the High Commissioner explained that her office had,

> in recent years adopted the usage of regional instruments such as the OAU Refugee Convention and the Cartagena Declaration, using the term "refugee" in the broader sense, to denote persons outside their countries who are in need of international protection because of a serious threat to their life, liberty or security of person in their country of origin as a result of persecution or armed conflict, or serious public disorder.[28]

Thus article I(2) has influenced how refugees are defined and described beyond Africa.

2. Bolstering an individual right to asylum

Asylum is 'the first and most fundamental of the refugee's needs and to grant him this constitutes the preliminary condition for him to have all other rights'.[29] The 1951 Convention does not, however, establish any individual right to asylum. The Universal Declaration of Human Rights (UDHR), by contrast, enshrines the right of individuals to 'seek and to enjoy' asylum,[30] but stops short of recognising any individual right to asylum at international law. The UN Declaration on Territorial Asylum[31] —which is recalled at paragraph 7 of the preamble to the 1969

[27] UNHCR, 'Note on International Protection (submitted by the High Commissioner)' (7 September 1994) A/AC.96/830, para 32.

[28] ibid.

[29] Goundiam (n 2) 9.

[30] UNGA, Res 217A (III) (10 December 1948) art 14(1). See, generally, Alice Edwards, 'Human Rights, Refugees, and the Right "To Enjoy" Asylum' (2005) 17 IJRL 293.

[31] UNGA, Res 2312 (XXII) (14 December 1967).

Convention—is similarly circumscribed. This resolution was followed, ten years after is adoption, by the UN Conference on Territorial Asylum, which also failed to recognise or codify any individual right to asylum.[32] In 1981, however, the African Charter recognised for the first time the right of persecuted individuals to 'seek and *obtain* asylum in other countries in accordance with the laws of those countries and international conventions'.[33] This will be analysed in chapter 5. It suffices to note here that despite this provision of the African Charter, the general conclusion remains that the grant of asylum is within the exclusive discretion of states; as states have no obligation to grant asylum, individuals have no right to asylum corresponding to their UDHR right to 'seek and to enjoy' it.[34]

While the 1969 Convention reflects this general conclusion, it nevertheless significantly 'strengthens the institution of asylum'[35] by providing,

> Member States of the OAU shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.[36]

This urging of states to grant asylum is 'a further inroad into the traditional international law perspective which has tended to regard asylum as an exclusive right of the sovereign state', but it is 'certainly not a right to be enforced by an individual

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[32] James C Hathaway, *The Law of Refugee Status* (Butterworths 1991) 13–6; Agnes Hurwitz, *The Collective Responsibility of States to Protect Refugees* (OUP 2009) 21–3.

[33] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58, art 12(3) (emphasis added).

[34] Goodwin-Gill and McAdam (n 16) 358; Paul Weis, 'The United Nations Declaration on Territorial Asylum' (1969) 7 Can YB Intl L 92, 137–9.

[35] Hofmann (n 7) 324.

[36] 1969 Convention (n 1) art II(1); presumably, 'well-founded reasons' must be read as referring to both the article I(1) and article I(2) refugee definitions, despite that fact that only article I(1) explicitly includes a requirement that the reasons for flight be well-founded.

against a state'.[37] The Convention does not stop there; mirroring part of the preamble to the UN Declaration on Territorial Asylum, it characterises the grant of asylum as a 'peaceful and humanitarian act' that 'shall not be regarded as an unfriendly act by any Member State'.[38] Article II of the 1969 Convention only, however, requires that states use their 'best endeavours consistent with their respective legislations' to welcome refugees; the language is not mandatory. The 1969 Convention thus incrementally advances, but does not enshrine, an individual right to asylum.[39]

3. Broadened *non-refoulement*?

While the 1969 Convention's contribution to the advancement of an individual right to asylum may be characterised as modest, its role regarding *non-refoulement* is usually characterised as being somewhat more significant. Thorough analysis, however, reveals that the 1969 Convention does not broaden *non-refoulement* by as much as is often posited.

The general principle of *non-refoulement* provides that an individual cannot be returned to a state where there is a real chance that he or she will face persecution, other ill-treatment or torture. This is codified in, or has been judicially read into, a number of international refugee[40] and human rights instruments,[41] and most

[37] Rwelamira (n 5) 170.

[38] 1969 Convention (n 1) art II(2).

[39] Rachel Murray, *Human Rights in Africa: From the OAU to the African Union* (CUP 2004) 189.

[40] See, for example, 1951 Convention (n 11) art 33; 1969 Convention (n 1) art II(3).

[41] See, for example, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 3; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23

commentators view the norm as having the status of customary international law.[42] Human rights-based *non-refoulement* is discussed in chapter 5; the focus here is on *non-refoulement* under refugee law. In this context, the norm, as articulated at article 33(1) of the 1951 Convention, prohibits states from expelling or returning 'a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'. The second paragraph of article 33, however, permits a national security exception.[43]

The 1969 Convention's *non-refoulement* provision, by contrast, seems an amalgam of the 1951 Convention's article 33(1) and article 3(1) of the UN Declaration on Territorial Asylum.[44] The 1969 Convention provides:

> [n]o person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty

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March 1976) 999 UNTS 171, art 7, read with para 12 of HRC, 'General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (29 March 2004), which states, 'the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed'. In Europe, human rights law *non-refoulement* also protects against expulsions that would violate the right to family life (*Moustaquim v Belgium* app no 12313/86 (ECtHR 18 February 1991)).

[42] See, for example, Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-refoulement: Opinion' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003) 140; contra: James C Hathaway, 'Leveraging Asylum' (2009) 45 Texas Intl LJ 503.

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

[44] This provides, '[n]o person referred to in article 1, paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State were he may be subjected to persecution' (UNGA, Res 2312 (XXII) (14 December 1967).

> would be threatened for the reasons set out in Article I, paragraphs 1 and 2.[45]

This is indeed broader than the 1951 Convention's *non-refoulement* provision, in three important respects; however, the 1969 Convention does not expand *non-refoulement* as greatly as is often suggested.

First, the 1969 Convention protects from return to situations in which the individual's life, physical integrity or liberty would be threatened, whereas the 1951 Convention lists only life and freedom. While 'liberty' and 'freedom' are presumably analogous, the 1969 Convention's inclusion of 'physical integrity' may broaden protection from *refoulement* somewhat, assuming it is conceivable that a situation could threaten one's physical integrity but not his or her freedom.

Second, the 1969 Convention's *non-refoulement* provision encompasses rejection at frontiers, while the 1951 Convention makes no such explicit provision. As a result, many commentators view *non-refoulement* under the 1969 Convention as broader than under the 1951 Convention.[46] State practice, however, has aligned the universal refugee regime with the standard of the 1969 Convention. According to Goodwin-Gill and McAdam, '[b]y and large, States in their practice and in their recorded views, have recognized that *non-refoulement* applies to the moment at which asylum seekers present themselves for entry, either within a State or at its

[45] 1969 Convention (n 1) art II(3).

[46] See, for example, Georges Abi-Saab, 'The Admission and Expulsion of Refugees with Special Reference to Africa' (2000) 8 Afr YB Intl L 71, 89; Nierum S Okogbule, 'The Legal Dimensions of the Refugee Problem in Africa' (2004) 10 E Afr J Peace & Hum Rts 176, 184; UNHCR, *The State of the World's Refugees 2000: Fifty Years of Humanitarian Action* (OUP 2000) 57; Jacob van Garderen and Julie Ebenstein, 'Regional Developments: Africa' in Zimmermann (n 16) 186.

border'.[47] At present, therefore, the 1969 Convention's conception of *non-refoulement* is no broader than that of the 1951 Convention, as far as applicability at frontiers is concerned.

Finally, the 1969 Convention expands *non-refoulement* because it does not include a national security exception like the one found in its universal counterpart. However, the 1969 Convention does not render *non-refoulement* absolute, as many scholars have suggested.[48] Pursuant to articles I(4)(f) and I(4)(g), the application of the 1969 Convention, and hence protection from *refoulement*, ceases if the individual concerned commits a serious non-political crime outside the country of refuge after admission as a refugee or if he or she seriously infringes the Convention's purposes and objectives. This, according to D'Sa, implies that the 1969 Convention, like the 1951 Convention, allows expulsion—and hence the risk of *refoulement*—in limited circumstances, 'although the OAU appears to deal with the latter somewhat indirectly'.[49] Of course, an individual whose refugee status has ceased pursuant to article I(4)(f) or I(4)(g) might still be protected from *refoulement* under another (human rights) instrument.[50]

[47] Goodwin-Gill and McAdam (n 16) 208.

[48] See, for example, Abi-Saab (n 46) 90; Chaloka Beyani, *Protection of the Right to Seek and Obtain Asylum Under the African Human Rights System* (Martinus Nijhoff 2013) 49; Mandal (n 22) 15; Rachel Murray, 'Refugees and Internally Displaced Persons and Human Rights: the African System' (2005) 24 RSQ 56, 57.

[49] Rose D'Sa, 'The African Refugee Problem, Relevant International Conventions and Recent Activities of the Organization of African Unity' (1984) 31 NILR 378, 388.

[50] See chapter 5.

4. Formalisation of responsibility sharing, temporary protection and voluntary repatriation

The 1969 Convention formalised for the first time versions of three important refugee law concepts: responsibility sharing, temporary protection and voluntary repatriation. Article II(4) articulates a very early notion of responsibility sharing, providing:

> [w]here a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international cooperation take appropriate measures to lighten the burden of the Member State granting asylum.

Such 'appropriate measures' include regional resettlement, financial support and political responsibility sharing.[51] Each possible method of responsibility sharing has, however, has been constrained in practice by the limited resources of African states.[52]

Temporary protection describes a variety of practices. While Goodwin-Gill identifies Perluss and Fitzpatrick Hartman's 1986 study[53] as 'a model in marshalling State practice, drawing appropriate inferences, and identifying *opinio juris*'[54] regarding temporary protection, Fitzpatrick's subsequent description of temporary protection as 'a magic gift, assuming the desired form of its enthusiasts' policy

[51] Jean-François Durieux and Agnes Hurwitz, 'How Many Is Too Many? African and European Legal Responses to Mass Influx of Refugees' (2004) 47 German YB Intl L 105, 128–9.

[52] ibid 128.

[53] Deborah Perluss and Joan Fitzpatrick Hartman, 'Temporary Refuge: Emergence of a Customary Norm' (1986) 26 Va J Intl L 551.

[54] Guy S Goodwin-Gill, 'Non-refoulement, Temporary Refuge, and the 'New' Asylum Seekers' in David James Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill Nijhoff 2014) 435.

objectives'[55] nevertheless remains accurate today. The dual meaning attributed to the notion of temporary protection articulated in the 1969 Convention indeed reflects Fitzpatrick's description.

Temporary protection finds expression at article II(5) of the 1969 Convention, which provides, '[w]here a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his re-settlement'. York University's Centre for Refugee Studies interpreted this as implying that the nature of protection granted under the 1969 Convention is of limited duration:

> [t]he debate about temporary *versus* permanent refugee protection has no real currency in the South, where protection has almost always been assumed to be temporary, even if it lasted for a long time. Protection has usually been provided by neighbouring countries with the clear understanding that the refugees would eventually return home. In fact, in Africa, temporary protection is not only common practice, it is given prominence in the Organisation [*sic*] of African Unity's 1969 Convention … Article II(5).[56]

The version of temporary protection actually posited by the 1969 Convention does not, however, imply limited protection. Rutinwa explains that article II(5)

> applies to persons who have been recognised as refugees but for one reason or another have not been granted the right of residence for any duration at all. It is not intended to determine the duration of residence for all refugees who have been recognised and granted asylum. … [Furthermore,] where a person is resettled from one African country to another on account of the first country not being able to continue to provide him or her asylum, the function of resettlement in this case is not to terminate but to continue the

[55] Joan Fitzpatrick, 'Temporary Protection of Refugees: Elements of a Formalized Regime' (2000) 94 AJIL 279, 280.

[56] Centre for Refugee Studies Refugee Research Unit, York University, 'The Temporary Protection of Refugees: A Solution-Oriented and Rights Regarding Approach' (1996) Discussion Paper prepared under the auspices of the research project 'Toward the Reformulation of International Refugee Law', 22, cited in Bonaventure Rutinwa, 'Prima Facie Status and Refugee Protection' (2002) UNHCR New Issues in Refugee Research Working Paper No 69 <http://www.unhcr.org/3db9636c4.pdf> accessed 8 December 2010, 16.

refugee status of that person but in a different country.[57]

Put this way, it becomes clear that the 1969 Convention's notion of temporary protection is more akin to responsibility sharing than it is to subsequent incarnations of temporary protection designed to limit states' obligations towards refugees. Under the 1969 Convention, it is the sojourn in the first country of asylum, not the protection, that is temporary.[58]

While the notion of temporary protection articulated by the 1969 Convention is a humanitarian one, it is interesting to note that it is premised on an idea that is fundamentally less so. Article II(5) exists to remedy the situation where a refugee has received asylum but no corresponding right of residence. That a refugee could be recognised as such but could also be lawfully deprived of a right of residence must be queried. A state's realisation of its obligations under the 1951 Convention—which applies co-extensively with the 1969 Convention[59]—to ensure refugees' rights clearly depends on their presence in the territory of the asylum state.[60] Indeed, article II(1), in urging states to grant asylum, conceives of such asylum in terms of reception and securing the 'settlement' of refugees.

Article V of the 1969 Convention addresses voluntary repatriation. Its first paragraph articulates the core principle: '[t]he essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against

[57] Rutinwa (n 56) 16.

[58] ibid.

[59] See chapter 4.

[60] See Violeta Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea' (2011) 23 IJRL 174, 204–5.

his will'. This principle is an important corollary of article II's provisions on asylum, particularly article II(3) on *non-refoulement*. The clauses that follow the core principle are premised on the assumption that the conditions for safe return have been met[61] and detail the duties of countries of asylum and origin and refugee assisting agencies. The sending state, in collaboration with the receiving state, must 'make adequate arrangements for the safe return of refugees who request repatriation',[62] while the country of origin must 'facilitate their resettlement and grant them the full rights and privileges of nationals of the country, and subject them to the same obligations'.[63] The Convention mandates countries of asylum, countries of origin, voluntary agencies and international and inter-governmental organisations to assist refugees with the process of return.[64] It provides in particular that states of origin should use the news media and the OAU to invite refugees home and should provide assurances regarding the circumstances prevailing there, and that host countries should ensure that such information is received.[65] Article V also provides that, upon return, refugees must not be penalised for having fled.[66]

The 1969 Convention was the first, and remains the only, international legal instrument to formally insist on the voluntariness of refugee repatriation,[67] however

[61] Okoth-Obbo (n 5) 126.

[62] 1969 Convention (n 1) art V(2).

[63] ibid art V(3).

[64] ibid art V(5).

[65] ibid art V(4).

[66] ibid.

[67] UNHCR, 'Handbook, Voluntary Repatriation: International Protection' (UNHCR 1996) <http://www.unhcr.org/3bfe68d32.pdf> accessed 4 February 2011, Annex 3.

previous articulations of the concept appear in the UNHCR statute,[68] an early UN General Assembly resolution[69] and the constitution of the International Refugee Organization,[70] UNHCR's predecessor. Furthermore, that repatriation should be voluntary is evidenced by state practice.[71] Its originality aside, article V(1) is a 'powerful statement of principle'[72] which despite isolated critiques,[73] is hailed as representing an early articulation of a principle that became a cornerstone of the international regime for refugee protection.[74] Unfortunately, however, the principle has been misinterpreted in the African context to suggest that repatriation sits atop a

[68] UNGA, Res 428 (V) (14 December 1950) Annex, para 1.

[69] UNGA, Res 8(I) (12 February 1946).

[70] Constitution of the International Refugee Organization (adopted 15 December 1946, entered into force 20 August 1948) 18 UNTS 3, art 2(1)(a).

[71] For example, in an agreement between Afghanistan and Pakistan, the latter agreed to facilitate 'voluntary orderly and peaceful repatriation' (Bilateral Agreement Between the Republic of Afghanistan and the Islamic Republic of Pakistan on the Voluntary Return of Refugees, 14 April 1988, 27 ILM 585, cited in Goodwin-Gill and McAdam (n 16) 495). Unfortunately, however, that repatriation should be voluntary is a principle which in Africa is often honoured in the breach; see, generally, Cristiano D'Orsi, 'Sub-Saharan Africa: Is a New Special Regional Refugee Law Regime Emerging?' (2008) 68 Heidelberg J Intl L 1057.

[72] Durieux and Hurwitz (n 51) 130.

[73] Barutciski argues that the standard introduced by article V(1) is incoherent: '[t]here are at least two ways to read this provision. If the two phrases of this sentence are meant to be read separately, the first phrase ignores the possibility of involuntary repatriation when a person is no longer a refugee according to the cessation clause found in article I(4)(e). The second phrase may suggest, *a contrario*, that refugees can be voluntarily repatriated, which is clearly not the case given the inclusion of the term 'refugee' which applies only to individuals who have reason to fear danger, and who are protected under the OAU Convention's *non-refoulement* guarantee. If the drafters intended that the two phrases of this sentence be read jointly in order to establish a single standard that relates to persons who satisfy the refugee definition, then the latter inconsistency still applies and a coherent provision would have stated that 'no refugee shall be repatriated', regardless of whether it is against his or her will' (Michael Barutciski, 'The Development of Refugee Law and Policy in South Africa: a Commentary on the 1997 Green Paper and 1998 White Paper/Draft Bill' (1998) 10 IJRL 700, 718). Article V(1)'s punctuation suggests that the drafters intended Barutciski's second reading, and in that context 'refugee' should be interpreted to imply an individual who was recognised as a refugee but who, at the time of repatriation, falls into the category of person described at article I(4)(e), whether or not the cessation clause has actually been invoked.

[74] Voluntary repatriation is one of UNHCR's trio of 'durable solutions' for refugees; the others are local integration and resettlement; see, generally, Marjoleine Zieck, *UNHCR and Voluntary Repatriation of Refugees: A Legal Analysis* (Martinus Nijhoff 1997).

hierarchy of solutions for refugees there.[75] Rutinwa explains that in fact, article V is 'much more about elaborating the principles and the modalities of effecting voluntary repatriation than a prescription of it as the only solution'.[76]

The 1969 Convention clearly introduced several important legal innovations. It articulated a new refugee definition, advanced an individual right to asylum, broadened the norm of *non-refoulement* somewhat and formalised the concepts of responsibility sharing, temporary protection and voluntary repatriation. The present section detailed these innovations and highlighted the ways in which some of them have been misunderstood. By far the most misunderstood legal innovation of the 1969 Convention, however, has been its regional refugee definition, to which the next section is devoted.

C. MISCONCEPTIONS

The article I(2) refugee definition is without a doubt the most celebrated feature of the 1969 Convention. Okoth-Obbo notes that the provision has 'generated a reputation which boarders [*sic*] on the mythical'.[77] The provision's mythical status is, however, arguably the result of several misconceptions about it which, taken together, have led to a somewhat erroneous 'interpretive consensus'[78] characterised by the almost universal propensity to view the article I(2) refugee definition as remarkably

[75] Rutinwa (n 56) 15–6.

[76] ibid 16.

[77] Okoth-Obbo (n 5) 109.

[78] Rankin (n 5) 410 & 414.

'expansive',[79] 'extensive',[80] 'wide'[81] or 'broad',[82] especially in relation to the 1951 Convention refugee definition.[83] This interpretive consensus has precluded critical analysis, thereby perpetuating the misunderstanding. Indeed, according to Rankin, the focus in the literature on the definition's broadness 'tends to gloss over … [its] vagueness and ambiguity'.[84]

While the article I(2) refugee definition has certainly extended international protection to individuals who would not otherwise qualify for refugee status,[85] it is not necessarily quite as inclusive or broad as most commentators suggest.[86] Indeed, the analysis below suggests that the 1969 Convention's regional refugee definition likely extends refugee protection only incrementally.[87] The handful of scholars who have engaged in serious critical analysis of the 1969 Convention have identified three particularly common misconceptions about the article I(2) refugee definition, which contribute to the flawed interpretive consensus about the definition's breadth: first, that all four events justifying flight under the 1969 Convention (1969 Events) remain

[79] Okogbule (n 46) 183; Hofmann (n 7) 323; Turner (n 6) 286.

[80] Ivor C Jackson, *The Refugee Concept in Group Situations* (Martinus Nijhoff 1999) 177.

[81] Emmanuel Opoku Awuku, 'Refugee Movements in Africa and the OAU Convention on Refugees' (1995) 39 J Afr L 79, 82; Okoth-Obbo (n 5) 112.

[82] Eduardo Arboleda, 'Refugee Definition in Africa and Latin America: The Lessons of Pragmatism' (1991) 3 IJRL 185, 194.

[83] Okoth-Obbo (n 5) 117.

[84] Rankin (n 5) 410.

[85] Murray (n 39) 188; Okoth-Obbo (n 5) 112; contra: Tamara Wood, 'Expanding Protection in Africa? Case Studies of the Implementation of the 1969 African Refugee Convention's Expanded Refugee Definition' (2015) 26 IJRL 555.

[86] Rankin (n 5) 410.

[87] This is borne out in practice: see Wood (n 85).

equally relevant today;[88] second, that the article I(2) refugee definition is entirely objective;[89] and third, that it applies only to groups[90] or was drafted with a view to promoting the group determination of refugee status.[91] Each of these misconceptions is addressed in turn below.

It should be noted that the objective of what follows is not to formulate an interpretation of the article I(2) refugee definition. This would require an extensive review of jurisprudence and state practice. The former is largely unavailable or difficult to access,[92] while there are almost no secondary sources on the latter; understanding African state practice of RSD under the regional definition would depend on extensive fieldwork. This is beyond the scope of this chapter and this work, which is focused on the whole African regime for refugee protection, rather than on individual elements of it.[93] This section in particular is focused on correcting common misconceptions about the 1969 Convention's regional refugee definition, so as to create a foundation for future work focused squarely on the article I(2) refugee definition.[94]

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[88] Okoth-Obbo (n 5) 116.

[89] ibid.

[90] Jean-François Durieux and Jane McAdam, 'Non-Refoulement through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies' (2004) 16 IJRL 4, 10.

[91] Durieux and Hurwitz (n 51) 120; Okoth-Obbo (n 5) 118; Rankin (n 5) 410.

[92] Marina Sharpe, 'The 1969 OAU Refugee Convention and the Protection of People Fleeing Conflict and Violence in the Context of Individual Refugee Status Determination' (2013) UNHCR Legal and Protection Policy Research Series Paper No 30 <http://www.unhcr.org/50f9652e9.html> accessed 18 January 2013, 8–9.

[93] Moreover, Tamara Wood at the University of New South Wales is currently authoring a doctoral thesis devoted exclusively to interpreting of the 1969 Convention article I(2) refugee definition.

[94] Including that of Wood (see n 93).

1. Continued relevance of all 1969 Events?

There is no consensus regarding the meaning of each of the 1969 Events—external aggression, occupation, foreign domination and events seriously disturbing public order—which 'lacked firm definition under international law'[95] when the 1969 Convention was drafted and adopted. Since then, scholars have made excellent efforts at elaborating the terms.[96] Ultimately, however, any authoritative consensus around their meaning will depend on the weight of reported judicial interpretation, of which there is a paucity in Africa,[97] and on an exhaustive survey of state practice, which is beyond the scope of this chapter. Accordingly, no attempt is made here to further articulate the terms' significance. Suffice it to highlight the lack of an interpretive consensus and the fact that three of the four 1969 Events—external aggression, occupation and foreign domination—largely ceased to be relevant with the end of colonialism and apartheid,[98] thereby narrowing the scope of the article I(2) definition considerably.

While Okoth-Obbo argues that 'external aggression', 'occupation' and 'foreign domination' could be viewed as 'vessels still possessed of the capacity for the legal transcription of Africa's refugee realities of today'[99]—the war in the DRC,

[95] Arboleda (n 82) 195.

[96] See Edwards (n 8); Mandal (n 22); Rankin (n 5); Sharpe (n 92).

[97] Sharpe (n 92) 8–9.

[98] Edwards (n 8) 216; Okoth-Obbo (n 5) 115–6.

[99] Okoth-Obbo (n 5) 116.

in which Uganda was held to be occupying power,[100] comes immediately to mind—on the whole the terms no longer carry the import they once did. The article I(2) definition 'was very appropriate … [in the 1960s] in that it addressed the immediate concerns of people fleeing from the colonial territories … and from the racist regimes in Southern Africa',[101] but it is less relevant in the contemporary context. Indeed, Okoth-Obbo ultimately concludes that the definition 'should be upgraded to more properly reflect the actual situations which today cause people to flee as refugees in Africa'.[102] With 'external aggression', 'occupation' and 'foreign domination' less relevant causes of refugee flight today, 'events seriously disturbing public order' assumes increased significance, and reaching an interpretive consensus about the term's precise meaning becomes of even greater importance.[103]

2. Extent of the regional refugee definition's objectivity

In moving away from the 1951 Convention's 'well-founded fear' standard in favour of a focus on the disruptive conditions in the country of origin or nationality, the article I(2) refugee definition certainly stresses objective considerations. According to Hathaway, it 'acknowledges the reality that fundamental forms of abuse may occur not only as a result of the calculated acts of the government … but also as a result of

[100] *Armed Activities in the Territory of the Congo* (*Democratic Republic of the Congo v Uganda*) (Judgment) [2005] ICJ Rep 2005 168, 227–31.

[101] Bahame Tom Mukirya Nyanduga, 'Refugee Protection Under the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa' (2004) 47 German YB Intl L 85, 92.

[102] Okoth-Obbo (n 5) 116; contra: Mandal (n 22) 14.

[103] To the extent that any such consensus currently exists, it is that the 'events seriously disturbing public order' must be generated by human activity. The article I(2) refugee definition does not permit so-called 'environmental refugees': Edwards (n 8) 225–7; Hathaway (n 32) 16–7; Mandal (n 22) 14; contra: Rwelamira (n 5) 171; Frans Viljoen, *International Human Rights Law in Africa* (2nd edn, OUP 2012) 243.

that government's loss of authority'.[104] This outward orientation has led to a conclusion among most scholars of the 1969 Convention that the article I(2) refugee definition is 'based solely on objective criteria'[105] and therefore mandates a completely objective test of refugee status.[106] This conclusion is problematic and overstated. It is problematic because the focus on the objectivity of the article I(2) refugee definition overestimates the subjectivity of the 1951 Convention definition and underestimates the extent to which this universal definition can apply to victims of conflict and violence. It is overstated because views of the article I(2) refugee definition as mandating an entirely objective test for refugee status overlook elements of the regional refugee definition that mandate an assessment of the nexus between the 1969 Event and the individual's flight. Each of these issues is addressed in turn below.

(a) The subjectivity and scope of the 1951 Convention

The view that the article I(2) refugee definition is objective is largely a relative one, as the regional definition is almost always assessed in relation to its international counterpart, which is usually viewed as including both objective ('well-founded') and subjective ('fear') elements. Oloka-Onyango, for example, notes that

> by moving away from the Geneva Convention's '… well founded fear of persecution …' standard, the OAU Convention explicitly gave credence to the fact that a refugee exodus could be the result of factors of a more

[104] Hathaway (n 32) 17.

[105] Awuku (n 81) 81.

[106] See, for example, Arboleda (n 82) 195; Okoth-Obbo (n 5) 112; Weis (n 2) 455; WJEM van Hövell tot Westerflier, 'Africa and Refugees: the OAU Refugee Convention in Theory and Practice' (1989) 7 NQHR 172, 175.

> general nature, intrinsic to the particular country in question, rather than to the individual subjective status or fears of the refugee.[107]

Such comparisons do the 1951 Convention refugee definition a disservice because they overemphasise its subjectivity, which some maintain was never even intended. Hathaway, for example, argues that 'the concept of well-founded fear is … inherently objective'.[108] He explains that the 'fear' element was included only to introduce a prospective risk assessment into the refugee definition.[109] Indeed, the view that the 1951 Convention includes a subjective element merely because it mandates an enquiry into an individual's (objective) circumstances seems an exaggeration of the concept of subjectivity.

Nevertheless, leading jurisprudence[110] and UNHCR's interpretive guidance[111] have affirmed the importance of the subjective aspect of the 1951 Convention refugee definition. A more salient point, therefore, is the extent to which focus on the objectivity of the article I(2) refugee definition in applying it to victims of conflict and violence underemphasises the extent to which the 1951 Convention refugee definition is equally applicable to such individuals. Okoth-Obbo explains that as the article I(2) refugee definition was increasingly 'pointed to as the unique example of positive law enabling the consideration of victims of war and civil strife as refugees … the more it

[107] Oloka-Onyango (n 5) 455.

[108] Hathaway (n 32) 65.

[109] ibid 66–75.

[110] See, for example, *Immigration and Naturalisation Service v Cardoza-Fonseca* 480 US 421 (1987) 451, where Stevens J notes, 'the very language of the term "well founded fear" demands a particular type of analysis—an examination of the subjective feelings of an applicant for asylum coupled with an inquiry into the objective nature of the articulated reasons for the fear'.

[111] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (UNHCR 1992) 11–2.

became possible to validate and reinforce the argument that the 1951 Convention did not apply to those categories'.[112] Similarly, Mandal observes that 'the very existence of the OAU Convention has been used by some to justify a conservative reading of the 1951 Convention'.[113]

Scholars have sought to correct such misinterpretations of the 1951 Convention. Durieux and McAdam, for example, argue that 'to assert that the [1951] Convention does not apply in cases of mass influx is tantamount to saying that the individual does not exist in a group'.[114] Similarly, Kälin maintains that the 1951 Convention can provide refugee status to individuals fleeing civil war.[115] Relating the 1951 Convention to the 1969 Convention, Jackson explains that while the wording of the article I(2) refugee definition is certainly broader than that of the 1951 Convention's article 1A(2), 'there must … necessarily be a considerable amount of overlapping and, as regards their practical application the difference between the two definitions is probably not as great as might at first sight appear'.[116] In line with this scholarship, UNHCR is currently developing guidelines on the applicability of the

[112] Okoth-Obbo (n 5) 117.

[113] Mandal (n 22) 12.

[114] Durieux and McAdam (n 90) 9. For this reason it is problematic to conceive of 'mass influx' by exclusive reference to generalised conditions, thereby almost necessarily precluding the applicability of the 1951 Convention. For example, Eggli defines mass influx as 'the sudden and rapid crossing of international borders by large numbers of uninvited foreigners who are seeking safety from *acute danger or other threats to their life and liberty*' (Ann Vibeke Eggli, *Mass Refugee Influx and the Limits of Public International Law* (Martinus Nijhoff 2002) 23 (emphasis added)). A more precise definition would include flight from persecution on a 1951 Convention ground as one among the many factors that may cause a mass refugee influx.

[115] Walter Kälin, 'Refugees and Civil Wars: Only a Matter of Interpretation?' (1991) 3 IJRL 435; see, also, UNHCR, 'Safe at Last? Law and Practice in Selected EU Member States with respect to Asylum-Seekers Fleeing Indiscriminate Violence' (2011) UNHCR Research Report <http://www.unhcr.org/refworld/pdfid/4e2ee0022.pdf> accessed 18 April 2012.

[116] Jackson (n 80) 178.

1951 Convention to victims of conflict and violence. Such doctrinal work has gone a long way towards correcting misinterpretations of the 1951 Convention, as will UNHCR policy in this regard. Yet if the article I(2) refugee definition continues to be assessed in relation to the 1951 Convention refugee definition, and if such comparisons continue to characterise the applicability of the 1969 Convention to objective circumstances as novel, the result will be the perpetuation of an unduly narrow view of the 1951 Convention refugee definition. Moreover, the extent to which refugee status under the regional refugee definition depends primarily on objective circumstances prevailing in the country of origin or nationality has been overstated, as is discussed below.

(b) Nexus in the test for refugee status under article I(2)

The view that the article I(2) refugee definition is based on objective criteria and therefore mandates a solely objective test of refugee status implies that no nexus or connection between the refugee and the circumstances prevailing in the country of origin or nationality is required. Commentary on the 1969 Convention has rarely addressed this question. Rather, there seems to be an implicit interpretive consensus, which presumes that an individual would not flee a 1969 Event but for a nexus between the event and a risk of harm. For example, in what represents an uncommon consideration of the issue, Hathaway concludes:

> [t]he OAU definition … leaves open the possibility that the basis or rationale for the harm may be indeterminate. So long as a person "is compelled" to seek refuge because of some anticipated serious disruption of public order, she need not be in a position to demonstrate any linkage between her personal status (or that of some collectivity of which she is a member) and the impending harm. Because the African standard emphasizes assessment of the gravity of the disruption of public order

> rather than motives for flight, individuals are largely able to decide for themselves when harm is sufficiently proximate to warrant flight.[117]

Hathaway's view is thus that in the determination of refugee status, flight itself is sufficient evidence of the proximity of harm. While in most cases such will indeed be the case, this approach obfuscates the importance of two textual elements of article I(2), which suggest that the nexus between the 1969 Event and flight ought to be more than merely presumptive.

The first textual element is the word 'compelled'. According to Edwards, the term 'compelled' mandates an analysis of the nexus between the 1969 Event and the individual. She argues that

> it would not be unreasonable in status procedures to require a claimant from Kinshasa [the capital of the 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.[118]

Rankin approaches the nature of the term 'compelled' with some ambivalence, though he concedes that it may mandate an assessment of the link between the 1969 Event and the individual: '[i]s the mere existence of an OAU event enough to demonstrate that someone has been compelled? Or is it necessary to show linkages between an asylum seeker and a particular event? Until these questions are answered *compelled* remains ambiguous'.[119] Thus there seems to be a consensus among those who have considered the issue that the import of the 'compelled' aspect of the

[117] Hathaway (n 32) 18.

[118] Edwards (n 8) 229–30.

[119] Rankin (n 5) 412.

regional refugee definition has been overlooked, and that it brings a consideration of the nexus between the 1969 Event and the individual into the determination of refugee status under article I(2). While the term 'compelled' is on its own insufficient to illuminate the precise nature of the nexus required—this issue is addressed below—what is clear is that the mere existence of a 1969 Event somewhere in the country of origin or nationality is not sufficient to ground a claim for refugee status under the 1969 Convention.

The second textual element suggesting that the nexus between the 1969 Event and the individual's flight ought to be more than merely presumptive is the words 'owing to'. The ordinary meaning of 'owing to' is analogous to 'as a result of', 'due to' or 'because of'. Accordingly, under the article I(2) definition, a refugee is someone who, as a result of, due to or because of a 1969 Event, flees his or her place of habitual residence. Put this way, it becomes clear that flight must be connected to a risk of harm to the individual stemming from a 1969 Event.

Moreover, a mere assumption that flight was the result of threatened harm does not reflect the targeted nature of the 1969 Convention. It is axiomatic that the 1969 Convention only extends refugee protection where such protection is necessary to safeguard the individual from a 1969 Event. That the Convention does not extend international protection indiscriminately suggests that its refugee definition should not be applied in an indiscriminate manner. Relying solely on objective criteria to determine refugee status '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'.[120] This could not have been intended.

That some nexus between the 1969 Event and the individual's flight is required raises the question of the nature of the connection necessary to ground a claim for refugee status under article I(2). The regional refugee definition provides that a refugee must have fled his or her 'place of habitual residence'. The 1951 Convention, by contrast, requires that the individual be outside 'the country of his nationality' or the 'country of his former habitual residence'.[121] According to Rankin, the 'place of habitual residence' clause is used to focus 'attention on those who face danger because of the state of *their communities*', resulting in 'an implied relationship or *geographic nexus* between an OAU event and a person's place of habitual residence'.[122] That the article I(2) definition requires physical proximity between the individual's home and the 1969 Event suggests that what the regional refugee definition demands is geographic proximity between the 1969 Event and the refugee's flight. Indeed, this was the approach taken in South African Refugee Appeal Board decisions analysed by Schreier.[123]

The requirement that flight must be from the 'place of habitual residence' also explains why the words 'in either part or the whole of his country of origin or

[120] Edwards (n 8) 230.

[121] 1951 Convention (n 11) art 1A(2).

[122] Rankin (n 5) 432 (emphasis added).

[123] Tal Hanna Schreier, 'An Evaluation of South Africa's Application of the OAU Refugee Definition' (2008) 25 Refuge 53, 60.

nationality'[124] do not expand the refugee definition by as much as might initially be expected. The language makes it at least initially plausible that an individual may be recognised as a refugee if his or her flight is prompted by a 1969 Event taking place anywhere in his or her country of origin or nationality. In context, however, it becomes clear that there is 'a necessary link between the asylum seeker and the OAU event … the nexus is created by the fact that an asylum seeker is compelled to leave his or her *place of habitual residence*'.[125] Moreover, the qualification 'in either part or the whole of his country of origin or nationality' likely relates only to the final 1969 Event, 'events seriously disturbing public order'. This is so for interpretive reasons—the lack of a comma between 'events seriously disturbing public order' and 'in either part or the whole of his country of origin or nationality' and the doctrine of *ejusdem generis*[126]—and because the necessity of specifying 'either part or the whole of his country of origin or nationality' attaches only to 'events seriously disturbing public order'. External aggression, occupation and foreign domination, even if only physically prevailing in one part of a state, will almost by definition affect the country as a whole. Edwards puts it as follows: 'the international requirement associated with the … 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*'.[127] The inclusion of 'in either part or the whole of his country of origin or nationality' thus should not be taken to imply that an individual may justifiably flee a 1969 Event not directly connected to him or her.

[124] 1969 Convention (n 1) art I(2).

[125] Rankin (n 5) 434; see, also, van Garderen and Ebenstein (n 46) 191.

[126] This maxim specifies that 'general words following special words are limited to the genus indicated by the special words' (Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed, Manchester University Press 1984) 153).

[127] Edwards (n 8) 227.

In summary, the terms 'compelled' and 'owing to', coupled with the 1969 Convention's obvious purpose of offering protection only to those at risk of harm, imply that the regional refugee definition requires a nexus between the 1969 Event and flight. The requirement that an individual have fled his or her 'place of habitual residence' and the limited applicability of 'in either part or the whole of his country of origin or nationality' clarifies that the nature of the nexus required is one of geographic proximity. Thus in principle, refugee status under the 1969 Convention's article I(2) should depend on an assessed, as opposed to presumed, geographic nexus between the 1969 Event and the individual's flight. This calls into question the sufficiency of determining refugee status on a purely objective basis, which in any case would often be little more than an exercise of determining nationality.[128]

However, it should be noted that in situations in which the 1969 Event affects the whole of the country of origin or nationality, the existence of such a nexus may, as a purely procedural matter, be presumed; any other approach would belabour the obvious and, particularly in large-scale influxes, would risk overwhelming already strained RSD processes. This approach finds support in the 1969 Convention's preamble, which notes 'with concern the constantly increasing numbers of refugees in Africa' and is 'desirous of finding ways and means of alleviating their misery and suffering as well as providing them with a better life and future'[129] and recognises 'the need for an essentially humanitarian approach towards solving the problems of refugees'.[130] Moreover, the presumption of a nexus between a widespread 1969 Event

[128] ibid.

[129] 1969 Convention (n 1) preambular para 1.

[130] ibid preambular para 2.

and flight is clearly the basis on which *prima facie* RSD—a common practice in Africa—rests,[131] and this has been the approach in individual claims in South Africa at least.[132] There, decision makers have relied on 'implicit "white lists" of refugee producing countries'[133] and focused on 'merely confirming the nationality of an asylum seeker'.[134]

The view that the test for refugee status under the 1969 Convention's regional refugee definition mandates an assessment of the nexus between the individual and the 1969 Event is bolstered by a close examination of the third common misconception about article I(2): that it applies only to groups or was drafted with a view to mandating the 'group' determination of refugee status. The conception that refugee status under article I(2) of the 1969 Convention was meant to be determined on a 'group' basis is highly compatible with a completely objective assessment of the compulsion to flee, based entirely on the conditions prevailing in the country of origin or nationality. However, upon close examination, it becomes clear that the

[131] See section C.3.

[132] Schreier (n 123) 55; Anais Tuepker, 'On the Threshold of Africa: OAU and UN Definitions in South African Asylum Practice' (2002) 15 JRS 409, 418.

[133] Observers have raised concerns about the 'white list' approach (Lee Anne de la Hunt, 'Refugee Law in South Africa: Making the Road of the Refugee Longer' in Legal Resources Foundation, *A Reference Guide to Refugee Law and Issues in Southern Africa* (Legal Resources Foundation, 2002) 34; Schreier (n 123) 55; Tuepker (n 132) 418), in particular because they may be unduly circumscribed. Schreier, for example, notes that the South African practice 'may include generalized and hence incorrect assumptions about what constitutes an OAU … event and a lack of appropriate consideration of the other elements of the definition' ((n 123) 61). A related problem is that applicants who are not from listed countries may find it comparatively difficult to have their refugee status recognized. Tuepker explains, '[w]hat is troubling is the frequent link to a converse practice of rejecting applicants on the basis of nationality' ((n 132) 418). It seems that 'white lists'—and the use of presumptions more generally—constitute an efficient mode of determining refugee status in certain contexts, as long as they and presumptions are not construed restrictively and do not lead to scepticism about the claims of individuals not from listed countries or from countries other than those in respect of which a presumption has been invoked.

[134] Schreier (n 123) 55; see, also, de la Hunt (n 133) 34.

'group' determination of status emerged solely as a result of practical considerations, and was never specifically intended. This issue and others are explored below.

3. 'Group' determination of refugee status and *prima facie* RSD

There are two misconceptions about the 1969 Convention and the so-called 'group' determination of refugee status. The first is highlighted by Durieux and McAdam, who assert that there is a popular perception that 'the OAU Convention applies only to groups, not to individuals'.[135] This perception is clearly erroneous, for two reasons. First, the 1969 Convention reproduces, at article I(1), the 1951 Convention refugee definition. It is beyond dispute that this definition applies to individuals.[136] Second, both the article I(1) and article I(2) refugee definitions are in the singular, providing that a refugee is 'every person' who has a well-founded fear of persecution on account of a particular characteristic[137] or who was compelled to leave his or her country of origin or nationality owing to a 1969 Event.[138] This clearly requires the individual determination of refugee status.[139]

The second, more common, misconception is that the 1969 Convention's article I(2) was purposely designed to address situations of mass influx[140] and, relatedly, provides the legal foundation for the 'group' determination of refugee

[135] Durieux and McAdam (n 90) 10.

[136] Goodwin-Gill and McAdam (n 16) 49.

[137] 1969 Convention (n 1) art I(1).

[138] ibid art I(2).

[139] Durieux and McAdam (n 90) 10.

[140] Durieux and Hurwitz (n 51) 116.

status.[141] Examples of this misconception abound. Nobel notes that the 1969 Convention's regional refugee definition is 'the legal basis for admitting refugee masses upon a group determination of their status'.[142] The Lawyers Committee for Human Rights[143] maintains that the 1969 Convention 'introduced the notion of group determination of refugee status'[144] and suggests that 'the preferable practice of group eligibility … is provided for under the OAU Convention'.[145] Milner explains that 'by making refugee status contingent on generalized situations in the refugee's country of origin, the 1969 OAU Convention allows states to recognize entire groups of individuals as refugees on the basis of shared characteristics and common cause of flight'.[146] D'Orsi notes that the 1969 Convention 'is meant to promote the *prima facie* recognition of groups of refugees'.[147] Most recently, Beyani noted that under the 1969 Convention 'both group and individual eligibility to refugee status determination exists'.[148] These views are incorrect.[149] Rather than being based on an analysis of the 1969 Convention, they arise out of the common practice in Africa of determining refugee status on a *prima facie* basis in situations of mass influx,[150] in

[141] Okoth-Obbo (n 5) 118; Rankin (n 5) 416.

[142] Peter Nobel, 'Refugees, Law, and Development in Africa' (1982) 3 Mich YB Intl L Stud 255, 262.

[143] This organisation is now known as Human Rights First.

[144] Lawyers Committee for Human Rights, *African Exodus: Refugee Crisis, Human Rights and the 1969 OAU Convention* (Lawyers Committee for Human Rights 1995) 5.

[145] ibid 22.

[146] James Milner, *Refugees, the State and the Politics of Asylum in Africa* (Palgrave Macmillan 2009) 7.

[147] D'Orsi (n 71) 1065.

[148] Beyani (n 48) 44.

[149] Durieux and Hurwitz (n 51) 116–8; Edwards (n 8) 228; Okoth-Obbo (n 5) 118–20; Rankin (n 5) 416–7.

[150] Rankin (n 5) 416.

which 'the numbers of the asylum seekers involved and the urgency to provide assistance … make it impracticable and forbiddingly costly to administer individual status determination'.[151] A first order issue, therefore, is to distinguish the 'group' determination of refugee status from *prima facie* RSD.

The consensus in the scholarly literature is that *prima facie* RSD is a process whereby an individual's refugee status is recognised on the basis of a legal presumption employed within the RSD process.[152] This understanding was articulated first by Jackson,[153] and was subsequently reiterated by Rutinwa,[154] Durieux and Hurwitz,[155] Durieux and McAdam,[156] Durieux[157] and Albert.[158] Recently, however, UNHCR published Guidelines on International Protection on the Prima Facie Recognition of Refugee Status. These Guidelines describe *prima facie* RSD as 'the recognition by a State or UNHCR of refugee status on the basis of readily apparent, objective circumstances in the country of origin', which brings individuals fleeing

[151] Rutinwa (n 56) 2.

[152] For a more general discussion of the legal meaning of *prima facie*, see Georg Nils Herlitz, 'The Meaning of the Term 'Prima Facie'' (1994-1995) 55 Louisiana L Rev 391.

[153] Jackson (n 80) 4.

[154] Rutinwa (n 56) 6.

[155] Durieux and Hurwitz (n 51) 120.

[156] Durieux and McAdam (n 90) 12.

[157] Jean-François Durieux, 'The Many Faces of 'Prima Facie': Group-Based Evidence in Refugee Status Determination' (2008) 25 Refuge 151.

[158] Matthew Albert, 'Governance and Prima Facie Refugee Status Determination: Clarifying the Boundaries of Temporary Protection, Group Determination, and Mass Influx' (2010) 29 RSQ 61, 65, although Albert uses the language of 'inference'. Understanding *prima facie* RSD as these scholars have is not incompatible with the article I(2) nexus requirement discussed above; a *prima facie* approach would simply presume the existence of a nexus between the 1969 Event and flight, and recognise an individual's refugee status on that basis.

such circumstances 'within the applicable refugee definition'.[159] The Guidelines do not construe such recognition as resulting from a presumption. Edwards, a UNHCR official, explained that the organisation decided to avoid the language of 'presumption' for several reasons. First, UNHCR generally avoids the use of legal presumptions in its Guidelines because the varied approaches to them across legal systems—for example, in some jurisdictions presumptions shift the burden of proof, while in others they change the standard of proof—undermines the consistent approach that UNHCR guidance seeks to promote.[160] Relatedly, in the context of *prima facie* RSD, UNHCR did not view either of the above-mentioned effects of legal presumptions as appropriate.[161] Finally, the mention of a presumption in the Guidelines risked creating confusion between a legal presumption employed within RSD, which is the understanding at the core of the academic consensus about *prima facie* RSD, and the nature of the refugee status that *prima facie* RSD confers,[162] which Okoth-Obbo has erroneously characterised as merely presumptive[163] and is discussed below.

This divergence between the scholarly consensus and UNHCR's approach aside, it is at least settled that *prima facie* RSD involves recognising refugee status based on readily apparent circumstances prevailing in the country of origin. That this

[159] UNHCR, 'Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status' (24 June 2015) HCR/GIP/15/11, para 1; this author, in her capacity as an expert consultant to UNHCR, authored the first draft of these Guidelines.

[160] E-mail correspondence with Alice Edwards, Senior Legal Coordinator and Chief, Protection Policy and Legal Advice Section, UNHCR, 10 December 2013.

[161] ibid.

[162] ibid.

[163] Okoth-Obbo (n 5) 119.

practice has been widely used in situations of mass influx,[164] which are characterised by 'the arrival across an international border of persons seeking protection in such numbers and at such a rate as to render individual determination of their asylum claims impracticable',[165] is the source of the erroneous conflation of *prima facie* RSD with the 'group' determination of refugee status. Schachter provides an example of this mis-association when he explains, 'if you see a whole group crossing a border because they are afraid for political reasons, then a decision is made en bloc, prima facie for the whole group'.[166] In fact, there is no such thing as 'group' RSD; it is just an imprecise way of expressing the resort to *prima facie* RSD in mass influx situations. Under a *prima facie* process of status determination, 'it is not the refugee quality … of the entire group that is determined, but that of each individual in the group. Groups do not accrue refugee status, be it *prima facie* or by any other means. Only individuals do'.[167] Albert puts it similarly when he maintains that *prima facie* RSD is 'better described as being an expedited form of individual RSD, not "group" RSD'.[168] This view is confirmed by UNHCR's guidance, which explains:

> situations have … arisen in which entire groups have been 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* (i.e. in the absence of evidence to the contrary) as a refugee.[169]

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[164] UNHCR Global Consultations, 'Protection of Refugees in Mass Influx Situations: Overall Protection Framework' UN Doc EC/GC/01/4 (19 February 2001) paras 3–4.

[165] UNHCR, 'Guidelines on the Application in Mass Influx Situations of the Exclusion Clauses of Article 1F of the 1951 Convention relating to the Status of Refugees' (February 2006), para 1.

[166] Oscar Schachter, 'Legal Aspects of the Refugee Problem' in HC Brooks and Y El-Ayouty (eds), *Refugees South of the Sahara: An African Dilemma* (Negro University Press 1970) 46–7.

[167] Durieux and Hurwitz (n 51) 118.

[168] Albert (n 158) 83.

[169] UNHCR (n 111) para 44 (emphasis added).

The more recent UNHCR Guidelines also make this point: although 'a prima facie approach may be applied within individual refugee status determination procedures…, it is more often used in group situations, for example where individual status determination is impractical, impossible or unnecessary in large-scale situations'.[170] Thus the ascription of 'group' RSD to the 1969 Convention has not only perpetuated a misconception about the Convention, which is discussed below, it has also contributed to the propagation of an erroneous legal concept without any actual basis in law, or at the very least to the proliferation of inaccurate legal terminology.

While when compared to the 1951 Convention refugee definition, article I(2) includes elements that are arguably easier to apply in situations of large-scale influx,[171] a close reading the 1969 Convention reveals no specific intention to introduce or promote the use of *prima facie* RSD in mass influx situations.[172] To the contrary, as noted above, the language of the 1969 Convention is in the singular. Furthermore, despite suggestions to the contrary,[173] the 1969 Convention is not unique in its applicability to situations of mass influx. Durieux and McAdam maintain that the 1951 Convention 'contains nothing to suggest its inapplicability in cases of mass influx'.[174] Nor is article I(2) of the 1969 Convention the only refugee definition that permits *prima facie* RSD: if the objective circumstances that triggered the application of the presumption of eligibility for refugee status 'are those under

[170] UNHCR (n 159) para 2.

[171] Durieux and Hurwitz (n 51) 116–7.

[172] ibid 117.

[173] See, for example, Viljoen (n 103) 243.

[174] Durieux and McAdam (n 90) 9.

Article IA(2) of the 1951 Refugee Convention … then the persons recognised to be *prima facie* refugees are refugees within the meaning of' that article.[175] Indeed, refugees who fled Hungary for Austria and Yugoslavia following the 1956 Soviet invasion and occupation were recognised on a *prima facie* basis under the 1951 Convention.[176] The determination of refugee status on a *prima facie* basis in situations of mass influx is not a product of the 1969 Convention, nor is it inherently or exclusively linked to that instrument. Rather, it arose as a matter of practical necessity in situations of mass influx.[177]

A related misconception has to do with the nature of the refugee status that recognition on a *prima facie* basis confers. There is a view that such recognition creates only a 'presumption of refugeehood and therefore entails an incomplete (or secondary) refugee status',[178] in terms of both its durability and the post-recognition rights that attach. Okoth-Obbo evidences this view when he notes that the 'prima facie concept refers to the provisional consideration of a person or persons as refugees without the requirement to complete refugee status determination formalities to establish definitively the qualification or not of each individual'.[179] This implies that refugees recognised on a *prima facie* basis receive only temporary protection[180] and do not qualify for the full range of rights conferred under individual processes of

[175] Rutinwa (n 56) 5.

[176] Sara E Davies, 'Redundant or Essential? How Politics Shaped the Outcome of the 1967 Protocol' (2007) 19 IJRL 703, 713.

[177] Albert (n 158) 66–8.

[178] Durieux and McAdam (n 90) 12.

[179] Okoth-Obbo (n 5) 119.

[180] Rutinwa (n 56) 15.

recognition. Indeed, according to the Lawyers' Committee for Human Rights, 'the notion of group eligibility under the OAU Convention was based on the premise of legally institutionalized temporary protection'.[181] Refugees recognised on a *prima facie* basis have also been referred to as 'non-Convention' refugees.[182]

Durieux and Hurwitz,[183] Durieux and McAdam,[184] Jackson[185] and Rutinwa[186] have each, however, rejected this view of *prima facie* refugee status as temporary and incomplete, on the basis of the conclusiveness of the presumption of refugeehood employed in their conception of *prima facie* RSD. While each author accepts that *prima facie* refugee status is indeed presumptive, the 'operation of the presumption provides full and sufficient evidence'[187] of refugee status, unless 'the State decides to subject it to scrutiny on an individual basis, and finds against the individual asylum seeker'.[188] That the presumption of refugee status within a process of *prima facie* RSD is conclusive suggests that refugees recognised pursuant to such a process are refugees like any other. Indeed, Rutinwa argues, 'if persons recognised as refugees on a *prima facie* basis are presumed to be refugees within the definitions found under the relevant instruments, it logically follows that their treatment should be in accordance

[181] Lawyers Committee for Human Rights (n 144) 30.

[182] Jennifer Hyndman and Bo Victor Nylund, 'UNHCR and the Status of Prima Facie Refugees in Kenya' (1998) 10 IJRL 21, 41.

[183] Durieux and Hurwitz (n 51) 120.

[184] Durieux and McAdam (n 90) 12.

[185] Jackson (n 80) 4.

[186] Rutinwa (n 56) 14.

[187] Duriuex and Hurwitz (n 51) 120.

[188] Durieux and McAdam (n 90) 12.

with the standards stipulated under those instruments'.[189] Similarly, Durieux and McAdam maintain, '[o]ne must conclude that *prima facie* recognition entails full refugee status, and beneficiaries of it are entitled, in Contracting States, to the standards of treatment stipulated by the 1951 Convention'.[190] Recent UNHCR guidance supports this view. The organisation's Guidelines on International Protection on the Prima Facie Recognition of Refugee Status provide that each

> refugee recognized on a prima facie basis benefits from refugee status in the country where such recognition is made, and enjoys the rights contained in the applicable convention/instrument. Prima facie recognition of refugee status is not to be confused with an interim or provisional status, pending subsequent confirmation. Rather, once refugee status has been determined on a prima facie basis, it remains valid in that country unless the conditions for cessation are met, or their status is otherwise cancelled or revoked.[191]

Once one understands what *prima facie* RSD is and how it operates, it becomes clear that it is merely a procedural tool that can have no effect on the substantive rights conferred. While this resolves the question of the nature of the status that attaches to refugees recognised on a *prima facie* basis, it raises the related wider issue of the nature of refugee status that results from recognition—whether on a *prima facie* basis or otherwise—under article I(2) of the 1969 Convention. This critical issue is addressed in the chapter that follows.

D. CONCLUSIONS

This chapter began by critically surveying the 1969 Convention's legal innovations. It went on to analyse one such innovation—the regional refugee definition—with a

[189] Rutinwa (n 56) 14.

[190] Durieux and McAdam (n 90) 12.

[191] UNHCR (n 159) para 7 (footnotes omitted).

view to questioning the common view that it is far broader than its international counterpart. This discussion revealed that three of the four 1969 Events are now largely irrelevant, that the article I(2) definition is not entirely objective and that the 1969 Convention does not apply only to groups, nor was it drafted with a view to allowing the *prima facie* determination of refugee status. This analysis of the 1969 Convention in general and the article I(2) refugee definition in particular will hopefully go some way towards correcting common misconceptions about the regional refugee instrument, most notably that its regional refugee definition is particularly expansive.

Having discussed the innovations in and misconceptions about the 1969 Convention, the next chapter is devoted to a discussion of a critical omission from it: the 1969 Convention's silence regarding refugees' civil and political and socio-economic rights. What will emerge is that this silence was not an omission as such, but rather an example of what is perhaps the 1969 Convention's most important innovation: the nature of its relationship to the 1951 Convention. The 1969 Convention was not only innovative in, among other things, incrementally expanding the range of individuals who could qualify for refugee status. In drawing on the existing universal instrument for the content of the status of which this broadened class of individuals would benefit, the drafters found a pioneering yet pragmatic way of ensuring that refugees in Africa are guaranteed the same rights as refugees elsewhere, while at the same time ensuring that issues particular to them—which the preceding chapter demonstrated was the ultimate objective of the 1969 Convention—were not neglected. This chapter's focus on the 1969 Convention's innovations was thus only a preview of how innovative the instrument really is.

CHAPTER 4

THE RELATIONSHIP BETWEEN THE 1951 AND 1969 CONVENTIONS

A. INTRODUCTION

The relationship between the 1951 Convention[1] and the 1969 Convention[2] in states party to both instruments[3] has, remarkably, received no attention in the literature on the 1969 Convention.[4] This is surprising given the attention paid in recent years to the relationships between different regimes of international law,[5] and because the relationship between the 1951 and 1969 conventions has important procedural and substantive implications. Most significant among the procedural implications, states party to both refugee instruments must determine which refugee definition should be considered first in RSD. Most important among the substantive implications is the

[1] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

[2] OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45.

[3] Most states in Africa are party to both the 1951 and 1969 conventions. Djibouti, Eritrea, Madagascar, Mauritius, Namibia, the SADR, Sao Tomé & Principe, Somalia and South Sudan are not party to the 1969 Convention. The Comoros, Eritrea, Libya, Mauritius and South Sudan are not party to the 1951 Convention or its 1967 Protocol; Cape Verde is not party to the 1951 Convention but has ratified the 1967 Protocol. The states that are party to the 1951 Convention and its 1967 Protocol but not the 1969 Convention are Djibouti, Namibia, Sao Tomé & Principe and Somalia; Madagascar is party to the 1951 Convention only and recognises its geographical limitation to Europe, while the Republic of Congo is party to both the 1951 Convention and its 1967 Protocol but recognises the European geographical limitation. The states that are party to the 1969 Convention but not the 1951 Convention or its 1967 Protocol are the Comoros and Libya.

[4] An exception is an article based on this chapter: Marina Sharpe, 'The 1969 African Refugee Convention: Innovations, Misconceptions, and Omissions' (2012) 58 McGill LJ 95.

[5] See, for example, Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 Mich J Intl L 999; International Law Commission, 'Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law - Report of the Study Group of the International Law Commission' (13 April 2006) A/CN4/L682 (Fragmentation Report); Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law: Postmodern Anxieties?' (2002) 15 Leiden J of Intl L 553; Seyed Ali Sadat-Akhavi, *Methods of Resolving Conflicts Between Treaties* (Nijhoff 2003).

rights to which refugees recognised only under the 1969 Convention—whether for procedural reasons or for failure to meet the 1951 Convention refugee definition—are entitled, a question raised by the 1969 Convention's silence regarding refugees' civil and political and socio-economic rights.

This chapter begins with an articulation of the various approaches to RSD in states party to both refugee conventions. In addition to surveying state practice in relation to this important procedural issue, the section also elucidates how and why a refugee might be recognised only under the 1969 Convention. The implications of such singular recognition in terms of refugee rights are then analysed. It is argued that refugees recognised only under the 1969 Convention are entitled to the same standards of treatment as refugees recognised under the 1951 Convention. Finally, other aspects of the relationship between the 1951 and 1969 conventions are considered. These are analysed within two categories. In the first, the relationships are complementary: one instrument addresses an issue on which the other is silent, or addresses a common issue more generously. The second category addresses inconsistencies between the 1951 and 1969 conventions.

In states with municipal refugee law, certain aspects of the relationship between the 1951 and 1969 conventions may be articulated by such domestic legislation or in related regulations. Uganda's Refugees Act, 2006, for example, includes the 1951 Convention and the regional refugee definitions, and all refugees under the Act are entitled to a range of rights derived from the 1951 Convention.[6] While such state practice is instructive, the focus here is on the international plane.

[6] The Refugees Act, 2006 (Uganda) No 21 of 2006.

Articulating the relationship between the 1951 and 1969 conventions on this plane contributes to a complete understanding of the two treaties, the 1969 Convention in particular, as well as to understanding the situation for refugees in monist jurisdictions. Legislation and other forms of state practice will, however, be invoked in support of some conclusions relating to the relationship between the two instruments on the international plane. This is done to shed light on particularly difficult relationship issues or when the issue at hand is inherently tied to state practice. This is the case with the issue addressed in the following section: the definition considered first in RSD.

B. THE REFUGEE DEFINITIONS IN STATUS DETERMINATION

The national legislation of African states with domestic refugee law generally incorporates both the 1951 Convention article 1A(2)/1969 Convention article I(1) refugee definition, as well as the regional definition,[7] whether by reproducing these refugee definitions in full or, less often, by referring to the relevant provisions of the

[7] The regional refugee definition can be found in the national refugee legislation of states including Angola, Benin, Burkina Faso, Burundi, Central African Republic, Congo, Gabon, Ghana, Lesotho, Liberia, Malawi, Mozambique, Nigeria, Rwanda, Senegal, Somalia, South Africa, Sudan, Tanzania, Uganda and Zimbabwe (Jamil Ddamulira Mujuzi, 'The African Commission on Human and Peoples' Rights and the Promotion and Protection of Refugees' Rights' (2009) 9 Afr Hum Rts LJ 160, 166). Exceptions to the rule that African refugee legislation generally reflects the international and regional refugee definitions are Botswana, Djibouti and Zambia. Botswana has not incorporated the 1969 Convention within its 1968 Refugees (Recognition and Control) Act, however the country's Refugee Advisory Committee has recognized individual applicants from neighbouring countries on the basis of 1969 Convention principles. Djibouti's 1977 refugee law does not incorporate the 1969 Convention, which it only signed in 2005 and which it has yet to ratify. In practice, however, Djibouti applies article I(2) to individuals fleeing South and Central Somalia, whom it recognises on a *prima facie* basis. Morocco's 1957 refugee law pre-dates the 1969 Convention; a new refugee law is being drafted. In Zambia, refugee status is declaratory, thus while the 1969 Convention has not been incorporated, the government has the discretion to recognise refugees from conflict and/or violence (Marina Sharpe, 'The 1969 OAU Refugee Convention and the Protection of People Fleeing Conflict and Violence in the Context of Individual Refugee Status Determination' (2013) UNHCR Legal and Protection Policy Research Series Paper No 30 <http://www.unhcr.org/50f9652e9.html> accessed 18 January 2013, 7).

international and regional refugee instruments.[8] When African states adjudicate refugee claims pursuant to these definitions, the decision on refugee status is generally made by an administrative eligibility committee on which a variety of government departments are represented. UNHCR usually has advisory observer status;[9] in rare cases, UNHCR has a decision-making role. Eligibility committees approach RSD in three principal ways. The first approach is for the committee itself to interview the refugee.[10] Under the second approach, another state official conducts the status determination interview and the eligibility committee makes a decision on the basis of notes or a transcript taken during such interview.[11] In the third and final approach, an eligibility official from the government's refugee or immigration department conducts the interview and provides the eligibility committee with a transcript and a reasoned recommendation, on which the committee bases its decision.[12] Some states combine elements from two or more of these approaches.

Appeals are generally, though not always, available. In some cases, the same eligibility committee that decided the first instance case—though sometimes featuring new members—hears and decides on the appeal.[13] In other countries, a separate

[8] Examples of this include Benin, Gabon, Ghana and Senegal (Sharpe (n 7) 7).

[9] As, for example, in Benin, Chad, Ethiopia, Gabon, Mozambique, Niger, Tanzania and Zambia (Sharpe (n 7) 7).

[10] For example, this is the case in Chad (Sharpe (n 7) 7).

[11] This is the situation in Uganda, where the police interview the applicant (Marina Sharpe and Salima Namusobya, 'Refugee Status Determination and the Rights of Recognized Refugees under Uganda's Refugees Act 2006' (2012) 24 IJRL 561, 569) and in Tanzania, where an 'authorised officer' conducts the interview (Sharpe (n 7) 8).

[12] For example, this is the approach in Angola, Mozambique and Zambia (Sharpe (n 7) 8).

[13] For example, this is the approach in Uganda (Sharpe and Namusobya (n 11) 570).

administrative appeals body exists.[14] Rarely is judicial review available, whether at the appeal level or as a third tier of review.[15]

Three procedural approaches to the instrument under which refugee status is adjudicated in states party to both the 1951 and 1969 conventions have been observed.[16] States may employ one of these approaches, or two or three of them in combination. In what may be termed a sequential approach, adjudication begins with an application of article 1A(2) of the 1951 Convention. Article I(2) of the 1969 Convention is considered only if the individual does not qualify for refugee status under the 1951 Convention.[17] This sequential approach is supported by paragraph 9 of the preamble to the 1969 Convention, which recognises the 1951 Convention as 'the basic and universal instrument relating to the status of refugees', as well as by the order of the two refugee definitions in article I of the 1969 Convention. Furthermore, it ensures that resettlement—which is often contingent upon 1951 Convention refugee status—remains readily available among UNHCR's trio of 'durable solutions' for refugees.[18]

[14] For example, this is the case in Malawi and Tanzania (Sharpe (n 7) 8).

[15] It is legally possible in, for example, South Africa and Zambia. It has never actually occurred in Zambia, while in South Africa it has occurred to a limited extent, though this has been on procedural rather than substantive grounds (Sharpe (n 7) 8).

[16] See Sharpe (n 7) 9.

[17] This is the approach in, for example, Benin and Burkina Faso. In the latter country, decisions are rendered on a form that instructs the decision-maker to proceed according to this sequence (Sharpe (n 7) 9).

[18] Non-African resettlement countries (usually Australia, Canada and the United States) will typically only resettle refugees recognised under the 1951 Convention, because the 1969 Convention does not apply to them; see, generally, Kristin Sandvik, 'A Legal History: The Emergence of the African Resettlement Candidate in International Refugee Management' (2010) 22 IJRL 20.

In another approach, the instrument applied is a function of the nature of the claimant's flight.[19] Where such dictates the application of article I(2), individual circumstances of persecution are not considered. Finally, in some countries,[20] there is a pragmatic tendency to conduct most RSD under the 1969 Convention's article I(2), even when the 1951 Convention refugee definition would also apply, both legally and factually.[21] This tendency of certain states to employ article I(2) pragmatically likely relates to the nature of the refugee flows they receive[22]—and in this regard there is overlap between the 'nature of flight' approach and this pragmatic approach—and to the fact that many states consider applying article I(2) to be generally more expedient and less resource intensive than applying article 1A(2) of the 1951 Convention.[23]

In addition to the sequential, 'nature of flight' and pragmatic approaches, the decision about which refugee definition to apply in RSD may be unsystematic[24] or, worse, evidence misunderstanding about the distinct nature of the two refugee

[19] For example, this approach is employed in Angola, Chad, Mozambique, Tanzania, Uganda, Zambia and Zimbabwe (Sharpe (n 7) 9), as well as in South Africa (Tal Hanna Schreier, 'An Evaluation of South Africa's Application of the OAU Refugee Definition' (2008) 25 Refuge 53, 54).

[20] Such as Angola, Mozambique and Zimbabwe (Sharpe (n 7) 10).

[21] Sharpe (n 7) 10.

[22] ibid.

[23] Zambia, for example, has a policy of conducting RSD on a *prima facie* basis under the 1969 Convention in the borderlands, where most refugees arrive. Those whose claims are more aligned with the 1951 Convention are referred to the capital, Lusaka, for individual determination under article 1A(2). Those who arrive in Lusaka without having transited through the borderlands also have their claims processed under the 1951 Convention (Sharpe (n 7) 10). See, also, George Okoth-Obbo, 'Thirty Years On: A Legal Review of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa' (2001) 20 RSQ 79, 120.

[24] In Nigeria, the refugee legislation of which includes both the 1951 and 1969 convention refugee definitions, an unreported case based on flight from unspecified insecurity was rejected under the 1951 Convention refugee definition without any subsequent consideration of the article I(2) definition. The same was true of an unreported decision from Guinea, regarding a woman who fled the conflict in Liberia in 1992 (Sharpe (n 7) 10).

definitions.[25] Such misunderstanding is unfortunate because the refugee definition pursuant to which an individual is recognised is important in two particular respects, beginning with cessation. As mentioned in chapter 2, the 1969 Convention includes two cessation clauses that do not feature in its international counterpart: the 1969 Convention ceases to apply to any refugee who has 'committed a serious non-political crime outside his country of refuge after his admission to that country as a refugee' [26] or has 'seriously infringed' the 1969 Convention's purposes and objectives.[27] According to Grahl-Madsen, these unique cessation clauses may result in an individual losing the 'benefit of the OAU Convention but not his refugee status, if that status is based on the Refugee Convention and Protocol, not merely on the special provisions of Art. I(2) of the OAU Convention'.[28] If, however, status were recognised under the 1969 Convention and one of the regional cessation clauses were to apply, the refugee would lose his or her status.

The definition pursuant to which a refugee in Africa is recognised may also be relevant in respect of the package of rights accompanying refugee status. Refugees within the meaning of the 1951 Convention definition are clearly entitled to the rights detailed in its articles 3 to 34. The rights to which refugees recognised only under the 1969 Convention—whether due to an application of the 'nature of flight' approach or the pragmatic approach, or due to rare circumstances in which an individual would

[25] In two unreported Guinean cases, the reasoning combined the 1951 Convention's 'membership of a particular social group' ground with the 1969 Convention's ground of 'events seriously disturbing public order'. This conflation was also evident in an unreported decision from Liberia (Sharpe (n 7) 10).

[26] 1969 Convention (n 2) art I(4)(f).

[27] ibid art I(4)(g).

[28] Atle Grahl-Madsen, 'Political Rights and Freedoms of Refugees' in Goran Melander and Peter Nobel (eds), *African Refugees and the Law* (The Scandinavian Institute of African Studies 1978) 54.

fail to qualify for refugee status under the 1951 Convention but would meet the article I(2) definition[29]—are, by contrast, less immediately obvious. The next section explores this important issue.

Before proceeding, however, it should be noted that in practice, issues that flow from the instrument of recognition are of course only salient where records indicating the instrument pursuant to which a refugee was recognized are reliably kept. For example, a state's ability to deprive a 1969 Convention refugee of 1951 Convention rights would depend on state officials being aware that the refugee was recognised pursuant to the 1969 Convention. UNHCR used to collect such data, but no longer does.[30] Some states in Africa keep track of the legal basis for refugee status—with varying degrees of accuracy—while others do not. South Africa, for example, records the instrument of recognition, though its records are not consistently reliable.[31] Zambia also keeps track of the refugee definition pursuant to which

[29] It should be noted that a refugee recognised under article I(2) will usually also meet the 1951 Convention (and the 1969 Convention article I(1)) refugee definition (see chapter 3, section C.2.a). However, some individuals will meet the 1969 Convention's regional refugee definition but not the 1951 Convention definition. Such individuals would include, for example, those fleeing the limited neo-colonial situations that Okoth-Obbo points out continue to occur in Africa (see chapter 3, section C.1) and those who, for evidentiary reasons, do not qualify under the 1951 Convention but whose country of origin is clearly affected by events seriously disturbing public order.

[30] Unpublished data collated by UNHCR's Field Information and Coordination Support Section recorded the legal basis for the refugee status of refugees in 41 African countries as of October 2011. This data was provided to Tamara Wood, doctoral candidate at the University of New South Wales, on 21 October 2011, and shared with this author on 24 August 2012. On 17 June 2015, Wood requested updated data in this regard. On 20 June 2015, she received a response from UNHCR's statistics unit indicating that data on the definition pursuant to which refugees in Africa were recognised was no longer being collected. Wood shared this correspondence with this author on 21 June 2015.

[31] South African statistics seen by Wood indicated that all refugees recognised during the reporting period received status pursuant to the 1951 Convention refugee definition, though Wood was aware of individuals recognised during the same period under the 1969 Convention definition (e-mail correspondence with Tamara Wood, doctoral candidate, University of New South Wales, 4 December 2013).

refugees on its territory are recognised.[32] Uganda, by contrast, does not record such information.[33]

C. THE RIGHTS OF 1969 CONVENTION REFUGEES

The 1969 Convention does not address refugees' civil and political and socio-economic rights, nor does it explicitly incorporate the 1951 Convention's article 3 to 34 rights framework. The lack of explicit or explicitly incorporated standards of treatment in the 1969 Convention raises the issue of the refugee rights applicable—in addition to those rights provided by human rights law more generally—to individuals who are recognised under article I(2) of the 1969 Convention but who do not meet the 1951 Convention refugee definition[34] or to individuals whose status, for the procedural reasons described above, is recognised only pursuant to the regional instrument.

While this issue is salient for all 1969 Convention refugees (regardless of whether recognition was pursuant to article I(1) or article I(2)), it is starker in relation to article I(2) refugees, because refugees recognised pursuant to article I(1) of the 1969 Convention would also qualify for refugee status under article 1A(2) of the 1951 Convention; the two definitions are almost identical and the same exclusion clauses apply.[35] The regional refugee definition, by contrast, has no 1951 Convention

[32] E-mail correspondence with Chongo Chitupila, former officer with the Zambian Commissioner for Refugees, 25 October 2013.

[33] E-mail correspondence with Salima Namusobya, Ugandan lawyer specialising in refugee law, 16 December 2013.

[34] See n 29.

[35] See chapter 2, section C.

parallel. The analysis is therefore framed in relation to article I(2) refugees. Nevertheless, its conclusion—that 1969 Convention refugees are entitled to 1951 Convention rights—applies to *all* 1969 Convention refugees. This point is of particular import because the situation of article I(1) refugees has been overlooked by most among the handful of scholars who have addressed the rights of 1969 Convention refugees.

Remarkably little academic attention has been devoted to the rights of 1969 Convention refugees. This is perhaps because it seems obvious to many that, in states that are party to both the 1951 and 1969 conventions, all refugees—regardless of the definition applicable—should benefit from the 1951 Convention's rights framework. Indeed, the scholars who have expressed this view have done so matter-of-factly or with very little analysis.[36] Among them, Fitzpatrick notes only that the extension of the refugee definition under the 1969 Convention was done 'without any suggestion that the quality or durability of … protection should be diminished as compared to that enjoyed by persons meeting the definition in the 1951 Convention'.[37] In discussing the domestic refugee laws of South Africa and Tanzania, Mandal mentions that the states' obligations under the 1969 Convention required them to guarantee the same rights to article I(2) refugees as to 1951 Convention refugees.[38] McAdam

[36] Admittedly none of the scholars discussed was explicitly addressing the question of the rights to which refugees recognised only under article I(2) of the 1969 Convention are entitled. Rather, in each case the issue arose as incidental to another question. What is truly remarkable is that none of the explicit analyses of the 1969 Convention has examined this issue, which represents further evidence of proposition advanced in chapter 3 regarding the dearth of critical analysis of the 1969 Convention.

[37] Joan Fitzpatrick, 'Temporary Protection of Refugees: Elements of a Formalized Regime' (2000) 94 AJIL 279, 293.

[38] Ruma Mandal, 'Protection Mechanisms Outside the 1951 Convention ("Complementary Protection")' (2005) UNHCR Legal and Protection Policy Research Series <http://www.unhcr.org/435df0aa2.pdf> accessed 8 December 2010, xi–ii.

maintains simply that the 1969 Convention, 'as a regional complement to the [1951] Convention, applies [1951] Convention rights to persons fleeing external aggression, occupation, foreign domination or events seriously disturbing public order'.[39] Similarly, Abass and Mystris explain that the 1969 Convention

> seeks to place itself as a complementary instrument to that of the UN's 1951 Convention. It does this through encouraging those African States that have not acceded to the Convention to take such steps as well as calling on the OAU Members to apply the provisions within Africa. The result was a clear indication, from the OAU, that the 1951 UN Convention is applicable to refugees within Africa, and that international standards were to be met as a minimum, while the 1969 OAU Convention develops the standards further and in an African-specific context.[40]

Van Hövell tot Westerflier argues that '[t]he majority of Africa's refugees, though not falling within the stricter scope of the 1951 Convention, is, at least in theory, entitled to claim the rights set forth in this Convention'.[41] Weis maintains that the 1951 Convention, the 1967 Protocol and the 1969 Convention 'together, constitute a codification of the rights—and duties—of refugees in Africa'.[42] Rutinwa echoes these opinions, anchoring his perspective in conference proceedings:

> [t]hat refugees recognised under section I(2) of the OAU Convention are entitled to the same standards of treatment as those recognised under the 1951 Refugee Convention was confirmed by the Arusha Conference which recognised the definitions of the term 'refugee' contained in Article I, paragraphs 1 and 2 of the 1969 OAU Refugee Convention as the basis for determining refugee status in Africa and stressed 'the essential need for ensuring that African refugees are identified as such, so as to enable them to invoke the rights established for their benefit in the 1951 Refugee Convention and the 1967 Refugee Protocol and the 1969 OAU Refugee

[39] Jane McAdam, *Complementary Protection in International Refugee Law* (OUP 2007) 38.

[40] Ademola Abass and Dominique Mystris, 'The African Union Legal Framework for Protecting Asylum Seekers' in Ademola Abass and Francesca Ippolito (eds), *Regional Approaches to the Protection of Asylum Seekers: An International Legal Perspective* (Ashgate 2014) 22.

[41] WJEM van Hövell tot Westerflier, 'Africa and Refugees: the OAU Refugee Convention in Theory and Practice' (1989) 7 NQHR 172, 174.

[42] Paul Weis, 'The Convention of the Organization of African Unity Governing the Specific Aspects of Refugee Problems in Africa' (1970) 3 Revue des droits de l'homme 449, 463.

> Convention'. This was irrespective of the procedure by which they were recognised.[43]

Durieux and Hurwitz also see 1969 Convention refugees as entitled to 1951 Convention rights. They rely on article VIII(2) of the 1969 Convention, which describes it as the 'regional complement' to the 1951 Convention, noting that '[o]n its face, the only possible interpretation of this provision is that a person recognized as a refugee under either branch of the definition in the complementary OAU Convention is entitled to the rights contained in the primary 1951 Convention'.[44] This view is reiterated in Durieux's later article with McAdam,[45] and by McAdam herself.[46] Rwelamira explains that in states that have ratified the universal and African refugee conventions:

> [t]he African refugee would then be able to enjoy the specific and well-defined rights relating to gainful employment, freedom of movement, welfare as well as rights relating to economic pursuit such as, labour legislation, acquisition of property, and other benefits related to employment.[47]

He concludes that '[i]n essence … one should regard the two Conventions as cumulative'.[48] This is probably what Beyani had in mind when he vaguely noted that

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[43] Bonaventure Rutinwa, 'Prima Facie Status and Refugee Protection' (2002) UNHCR New Issues in Refugee Research Working Paper No 69 <http://www.unhcr.org/3db9636c4.pdf> accessed 8 December 2010, 14 (footnote omitted); for more information on the Arusha Conference, see chapter 6, section B.2.

[44] Jean-François Durieux and Agnes Hurwitz, 'How Many Is Too Many? African and European Legal Responses to Mass Influx of Refugees' (2004) 47 German YB Intl L 105, 126.

[45] Jean-François Durieux and Jane McAdam, 'Non-Refoulement through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies' (2004) 16 IJRL 4, 11.

[46] McAdam (n 39) 213.

[47] Medard RK Rwelamira, 'Some Reflections on the OAU Convention on Refugees: Some Pending Issues' (1983) 16 Comp & Intl LJ S Afr 155, 171.

[48] ibid 173.

'there exists a legal basis for the dual application of the principles contained in'[49] the 1951 and 1969 conventions.

Others, however, have adopted the opposite perspective, with a similar near absence of legal argument. Barutciski, describing the 1969 Convention as a protection system 'meant to address mass flows'—an erroneous attribution discussed in the preceding chapter—goes on to maintain that such systems 'do not give refugees significant rights beyond *non-refoulement* guarantees'.[50] He further explains that, while the 1969 Convention's regional refugee definition

> means that it is the sole international refugee treaty which applies to most African refugees, it does not include the elaborate socio-economic rights found in the 1951 Convention. … Limited rights apparently encourage a more liberal admission policy in situations of mass inflow, while elaborate rights that may lead to integration tend to discourage Governments from allowing refugees to access their territories.[51]

Barutciski is not alone in his perspective. Mendel maintains that

> the 1951 Convention may be described as guaranteeing extensive benefits, tending towards residence rights, to a narrowly defined class of individuals. The OAU Convention, on the other hand, provides relatively limited benefits, broadly consistent with maintenance in camps, to those fleeing a wide range of situations.[52]

Viljoen has also construed refugee rights in Africa narrowly, however this is based on different—though equally flawed—legal reasoning. He asserts that with the exception of *non-refoulement*, the 1969 Convention 'does not provide explicitly for the "rights" of refugees. Still, entitlements (or "indirect rights") are implied by the imposition of

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[49] Chaloka Beyani, *Protection of the Right to Seek and Obtain Asylum Under the African Human Rights System* (Martinus Nijhoff 2013) 11.

[50] Michael Barutciski, 'The Development of Refugee Law and Policy in South Africa: a Commentary on the 1997 Green Paper and 1998 White Paper/Draft Bill' (1998) 10 IJRL 700, 714.

[51] ibid.

[52] Toby D Mendel, 'Refugee Law and Practice in Tanzania' (1995) 9 IJRL 35, 57.

obligations on states, thus rendering the OAU Refugee Convention a "human rights related" treaty'.[53]

De la Hunt surely had views such as these in mind when she noted the emergence of an erroneous trend viewing the 1969 Convention as proposing 'an entirely different kind of refugee regime that [gives] fewer rights to more refugees'.[54] Chartrand had earlier anticipated the emergence of this trend:

> [t]he broadening of the definition of the term refugee could … raise problems if it leads to the emergence of different classes of refugees—those who qualify for refugee status under all the relevant international instruments and those who qualify under only one—with confusion and disagreement among states and international agencies as to whom to accord which standard of treatment.[55]

While the majority of scholars who have addressed this issue, however briefly, agree that article I(2) refugees benefit from 1951 Convention rights in states party to both instruments, the existence of an opposite minority point of view and the sparse legal reasoning on both sides of the divide suggest that the issue deserves sustained attention. Three principal arguments are advanced in support of the view that 1969 Convention refugees in host states party to both the 1951 and 1969 conventions are entitled to the full range of rights guaranteed by the former instrument: a *lex specialis* argument, an equality argument and, finally, a treaty

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[53] Frans Viljoen, *International Human Rights Law in Africa* (2nd edn, OUP 2012) 241–2; this perspective could be reconciled with the view of the 1969 Convention articulated below if such 'obligations' included an obligation for states to ratify or accede to the 1951 Convention, however the 1969 Convention imposes no such obligation.

[54] Lee Anne de la Hunt, 'Refugee Law in South Africa: Making the Road of the Refugee Longer' (2002) US Committee for Refugees and Immigrants <http://www.refugees.org/world/articles/safrica_wrs02.htm> accessed 6 May 2011, cited in Micah Bond Rankin, 'Extending the Limits or Narrowing the Scope? Deconstructing the OAU Refugee Definition Thirty Years On' (2005) 21 S Afr J Hum Rts 406, 417.

[55] Philip E Chartrand, 'The Organization of African Unity and African Refugees: A Progress Report' (1975) 137 World Aff 265, 272.

interpretation argument that is supported by certain general principles of international law. Each of these arguments is addressed in turn below; they are in addition to the obvious points that viewing article I(2) refugees as not entitled to 1951 Convention rights empties the 1969 Convention's article II on asylum of all but the most base content, and that the procedural fact of which instrument a refugee is recognised under should not affect his or her substantive rights. Before proceeding, however, it is necessary to examine ExCom's 'seminal'[56] conclusion on the 'Protection of Asylum-Seekers in Situations of Large-Scale Influx'.[57]

1. ExCom Conclusion 22

ExCom Conclusion 22 may, at first blush, appear to support the perspective of Barutciski and Mendel. It could equally seem to support the false proposition discussed in the previous chapter, that refugees recognised on a *prima facie* basis enjoy fewer rights than their counterparts recognised via ordinary status determination. The Conclusion begins by noting that large-scale influxes may include refugees within the meaning of the 1951 Convention or persons 'who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of their country of origin or nationality are compelled to seek refuge outside that country'.[58] It then goes on to enumerate 16 standards of treatment for 'asylum-seekers who have been temporarily admitted to a

[56] Guy S Goodwin-Gill, 'Non-refoulement, Temporary Refuge, and the 'New' Asylum Seekers' in David James Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill Nijhoff 2014) 434.

[57] ExCom Conclusion No 22 (XXXII), 'Protection of Asylum-Seekers in Situations of Large-Scale Influx' (1981).

[58] ibid para I1.

country pending arrangements for a durable solution'.[59] The list does not include certain rights guaranteed by the 1951 Convention, such as to education,[60] to gainful employment,[61] to social security[62] and to identity papers[63] or a travel document.[64]

The protection regime established by ExCom Conclusion 22 applies only, however, to large-scale influxes in which '[s]tates, although committed to obtaining durable solutions, have only found it possible to admit asylum-seekers without undertaking at the time of admission to provide permanent settlement'.[65] In other words, the Conclusion applies only to situations of temporary protection—not the circumstance at issue here—and even in such situations, according to Goodwin-Gill the Conclusion provides 'a point of departure only'; in certain circumstances, 'even a "temporary" solution may require more substantial provision for refugees, including the opportunity to earn a living and to have access to education, housing, and social assistance'.[66] This view was affirmed during UNHCR's Global Consultations on International Protection, during which it was noted that ExCom Conclusion 22 'was never intended as a substitute for standards of protection under the 1951

[59] ibid para IIB.

[60] 1951 Convention (n 1) art 22.

[61] ibid art 17.

[62] ibid art 24.

[63] ibid art 27.

[64] ibid art 28.

[65] ExCom (n 57) para I(2).

[66] Guy S. Goodwin-Gill, 'Non-refoulement and the New Asylum Seekers' (1986) 26 Va J Intl L 897, 906.

Convention'.[67] Moreover, McAdam explains that the protection regime established by the Conclusion must be understood within the particular context in which it was adopted, namely the mass exodus from Indochina beginning in the mid-1970s, when numbers overwhelmed individual processing and front-line states were not party to the 1951 Convention.[68] The Conclusion, therefore, 'filled a gap by identifying existing normative standards for States not bound by the [1951] Convention or [1967] Protocol'.[69] In considering the very particular circumstances to which it applies, it becomes clear that ExCom Conclusion 22 provides no support for the proposition that article I(2) refugees enjoy fewer rights than those recognised pursuant to the 1951 Convention. Nor does it support the idea that refugees recognised on a *prima facie* basis enjoy more circumscribed rights than those recognised in the conventional manner.

2. The 1951 Convention as *lex specialis*

'Complementary protection' describes the protection from *refoulement* 'granted by States on the basis of an international protection need outside the 1951 Convention framework'.[70] The source of the prohibitions against *refoulement* subsumed within the concept of complementary protection generally arise from, or have been read into, international and regional human rights instruments, such as the Convention against

[67] UNHCR Global Consultations, 'Protection of Refugees in Mass Influx Situations: Overall Protection Framework' UN Doc EC/GC/01/4 (19 February 2001) para 8.

[68] McAdam (n 39) 246–7.

[69] ibid 247.

[70] ibid 21.

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[71] (CAT) and the European Convention for the Protection of Human Rights and Fundamental Freedoms.[72] In her study of complementary protection, McAdam argues that the 1951 Convention 'functions as a form of *lex specialis* (specialist law) for all those in need of international protection, and provides an appropriate legal status irrespective of the source of the State's protection obligation'.[73] In other words, McAdam's view is that the content of complementary protected status derives from the rights framework contained in the 1951 Convention, regardless of the fact that the beneficiaries of such status are not refugees within the meaning of the 1951 Convention's article 1A(2). McAdam advances several propositions in support of this thesis, but the core of her argument is that the 1951 Convention's

> application has been extended through the expansion of *non-refoulement* under human rights law … rather than by the conventional means of a Protocol. … Since the scope of *non-refoulement* has been broadened by subsequent human rights instruments, this necessarily widens the Convention's application.[74]

If the 1951 Convention provides the rights blueprint for all beneficiaries of complementary protection, then such rights must apply equally to refugees within the meaning of article I(2) of the 1969 Convention. McAdam argues that the progressive

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[71] Adopted 10 December 1984, entered into force 26 June 1987, 1465 UNTS 85, art 3(1); see chapter 3, n 41.

[72] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (4 November 1950) art 3.

[73] McAdam (n 39) 1. However, the 1951 Convention cannot be said to provide beneficiaries of complementary protection with status as such, because the status accorded by the 1951 Convention is refugee status, for which beneficiaries of complementary protection by definition do not qualify. McAdam's argument would have been more convincing had she argued that the 1951 Convention articulates the *content* of complementary protected status, rather than any status as such. Furthermore, her designation of the 1951 Convention's rights framework as the *lex specialis* for all persons in need of international protection is problematic because it may be taken to suggest that refugees are not also entitled to rights derived from human rights law.

[74] McAdam (n 39) 209.

development of human rights based *non-refoulement*, in extending the range of individuals entitled to international protection, also extended the applicability of the 1951 Convention. Surely the 1969 Convention's extension of protection from *refoulement* to individuals fleeing a 1969 Event extends the 1951 Convention's applicability in a similar fashion, especially because, as refugees, individuals recognised under article I(2) of the 1969 Convention are in a situation even more conceptually similar to 1951 Convention refugees than are beneficiaries of complementary protection.

This argument is of even more force when one considers McAdam's reasoning regarding why human rights instruments do not themselves provide for status in addition to protection from *refoulement*. She argues that it would be 'futile for instruments like the CAT to enumerate the legal status arising from the application of *non-refoulement*, since the Refugee Convention (as the *lex specialis*) already provides an appropriate status for any person protected by that principle'.[75] It would be similarly futile for the 1969 Convention to enumerate an exhaustive list of refugee rights, since the 1951 Convention, as the *lex specialis* on the content of refugee status, already does so. Indeed, Bakwesegha explains that the 'issue of rights of refugees is not raised [in the 1969 Convention] because they were adequately covered in the 1951 … Convention'.[76]

The argument that beneficiaries of complementary protection, and hence article I(2) refugees, enjoy 1951 Convention rights by virtue of that instrument being

[75] ibid 209–10.

[76] Chris J Bakwesegha, 'The OAU and African Refugees' in Yassin El-Ayouty (ed), *The Organization of African Unity after Thirty Years* (Greenwood Publishing Group 1994) 11.

the *lex specialis* for individuals in need of international protection must, however, be approached with some caution in light of Hathaway's critique of McAdam's work.[77] Hathaway rejects McAdam's thesis on two principal grounds. First, he argues that 'there is no basis to suggest that the Refugee Convention exists to delineate the entitlements of persons granted protection against *refoulement*'.[78] In other words, he asserts that McAdam's argument is simply not substantiated, an assertion to which McAdam has responded.[79]

Second, Hathaway maintains that McAdam's contention is premised on an incorrect application of *lex specialis*. '*Lex specialis*' is shorthand for '*lex specialis derogare lege generali*',[80] a widely accepted maxim of legal interpretation used to resolve norm conflicts.[81] Hathaway accepts this primary understanding of *lex specialis* and explains that the maxim can also be employed 'to assist in the construction of a general provision in relation to a matter also governed by a more specific norm'.[82] He argues that McAdam, however, employs *lex specialis* in quite a different sense: to extend the 1951 Convention's 'beneficiary class to embrace persons outside its textual ambit'.[83] According to Hathaway, '[b]ecause there is simply a legal void to be filled in relation to non-refugees, there is no conflict of rules

[77] James C Hathaway, 'Leveraging Asylum' (2009) 45 Texas Intl LJ 503.

[78] ibid 531.

[79] Jane McAdam, 'Status Anxiety: Complementary Protection and the Rights of Non-Convention Refugees' (2010) University of New South Wales Faculty of Law Research Series <http://law.bepress.com/unswwps/flrps10/art1/> accessed 13 October 2011.

[80] Which means: special law derogates from general law.

[81] Fragmentation Report (n 5) paras 56–7.

[82] Hathaway (n 77) 533; see, also, Fragmentation Report (n 5) para 56.

[83] Hathaway (n 77) 532.

that lex specialis can assist to resolve'.[84] Hathaway further argues that the secondary usage of *lex specialis* similarly provides no support for McAdam's position:

> the importance of interpreting general rules in harmony with more specific rules does not advance McAdam's thesis that the absence of rules defining the status of the broader class of non-returnable persons must be filled by effectively recasting the Refugee Convention's beneficiary class.[85]

McAdam has responded to these critiques as well.[86]

Hathaway's critique of McAdam has itself been criticised.[87] Yet if, as Hathaway contends, the 1951 Convention is not the *lex specialis* for all individuals in need of international protection, then it clearly becomes impossible to argue that 1951 Convention rights apply to article I(2) refugees on that basis. In light of Hathaway's critique, it seems that McAdam's position is merely *lex ferenda*. Resolving the issue of whether article I(2) refugees can enjoy 1951 Convention rights does not, however, depend on McAdam's view being *lex lata*. A range of other bases, detailed below, exists, leading to the conclusion that article I(2) refugees do enjoy 1951 Convention rights. One stems from a point on which Hathaway and McAdam agree: both authors, and others,[88] have found that the law of non-discrimination provides a basis for guaranteeing 1951 Convention rights to beneficiaries of complementary protection.[89] The thesis that the legal duty of non-discrimination mandates the equal treatment of

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[84] ibid 533.

[85] ibid 534.

[86] McAdam (n 79).

[87] Goodwin-Gill (n 56) 447-57.

[88] See, for example, Tom Clark, 'Rights Based Refuge, the Potential of the 1951 Convention and the Need for Authoritative Interpretation' (2004) 16 IJRL 584; Tom Clark and François Crépeau, 'Mainstreaming Refugee Rights: The 1951 Refugee Convention and International Human Rights Law' (1999) 17 NQHR 389.

[89] Hathaway (n 77) 529; McAdam (n 39) 220–3.

refugees and beneficiaries of complementary protection was developed by Pobjoy,[90] while Hathaway has explored the role of non-discrimination regarding equal treatment between citizens and non-citizens[91] and between and among 1951 Convention refugees.[92] Furthermore, courts have used the universal proscription of discrimination in refugee protection contexts.[93] An equality-based approach can equally be employed for the benefit of article I(2) refugees, as is demonstrated below.

3. Equality

The legal duty of non-discrimination requires that 'irrelevant criteria not be taken into account in making allocations'.[94] Article 26 of the International Covenant on Civil and Political Rights[95] (ICCPR) articulates this duty with particular force because the ambit of its guarantee is not limited to the ICCPR alone;[96] rather, it applies to the 'allocation of all public goods, including rights not stipulated by the Covenant itself'.[97] Article 26 provides:

> [a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law

[90] Jason Pobjoy, 'Treating Like Alike: The Principle of Non-Discrimination as a Tool to Mandate the Equal Treatment of Refugees and Beneficiaries of Complementary Protection' (2010) 34 MULR 181.

[91] James C Hathaway, *The Rights of Refugees Under International Law* (CUP 2005) 123–47.

[92] ibid 238–60.

[93] See, for example, *R (European Roma Rights Centre and others) v Immigration Officer at Prague Airport and another (United Nations High Commissioner for Refugees intervening)* [2004] UKHL 55.

[94] Hathaway (n 91) 124.

[95] International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171.

[96] Human Rights Committee, 'General Comment No 18: Non-discriminatino' (11 October 1989) para 12.

[97] Hathaway (n 91) 125.

> shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

This provision ensures formal equality (equality before the law) as well as substantive equality (equal protection of the law).[98] However, inspired by Justice Tanaka's seminal dissenting opinion in *South West Africa*, article 26 does not establish an unconditional guarantee of equality. Ruling on whether the racist government of South West Africa was in breach of the applicable League of Nations mandate, Tanaka observed,

> [e]qual treatment is a principle but its mechanical application ignoring all concrete factors engenders injustice. Accordingly, it requires different treatment, taken into consideration, of concrete circumstances of individual cases. The different treatment is permissible and required by the considerations of justice; it does not mean a disregard of justice. Equality being a principle and different treatment an exception, those who refer to the different treatment must prove its *raison d'être* and its reasonableness.[99]

Accordingly, not every instance of differential treatment amounts to discrimination; in many circumstances, it is perfectly reasonable for a state to differentiate between groups. Rather, equality requires that any unequal treatment be 'properly justified, according to consistently applied, persuasive, and acceptable criteria'.[100] The UN Human Rights Committee (HRC), which is the ICCPR's treaty-monitoring body, has thus observed 'that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'.[101] Thus to

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[98] HRC (n 96) para 1.

[99] *South West Africa* (*Ethiopia v South Africa; Liberia v South Africa*) (Judgment) [1966] ICJ Rep 6, 308–9.

[100] Christopher McCrudden, 'Equality and Discrimination' in David Feldman (ed), *English Public Law*, vol XI (OUP 2004), cited in Hathaway (n 91) 124.

[101] HRC (n 96) para 13.

amount to discrimination under article 26, unequal treatment must be based on criteria that are neither reasonable nor objective, nor in pursuit of a legitimate aim.[102]

Pobjoy has distilled article 26 as qualified by the HRC into a convenient three-pronged test for establishing unlawful discrimination:

> 1. Has there been differential treatment between individuals in similar circumstances? In other words, is there an inequality *basis* for a discrimination claim?
> 2. Is the unequal treatment based on a ground captured by art 26?
> 3. Is the unequal treatment based on 'reasonable and objective' criteria?[103]

This test, with the 'pursuit of a legitimate aim' appended to its third prong,[104] will be applied to determine whether article 26 prohibits the differential allocation of rights as between refugees recognised pursuant to article 1A(2) of the 1951 Convention and refugees recognised under article I(2) of the 1969 Convention.[105] As a preliminary matter, however, it must be established that an article I(2) refugee could invoke the ICCPR vis-à-vis his or her host state, assuming that state has ratified the ICCPR and its optional protocol permitting individual communications.[106] The HRC has confirmed that as a general rule, the rights enshrined in the ICCPR 'must be

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[102] See, generally, Nisuke Ando, 'The Evolution and Problems of the Jurisprudence of the Human Rights Committee's Views Concerning Article 26' in Nisuke Ando (ed), *Towards Implementing Universal Human Rights: Festschrift for the Twenty-Fifth Anniversary of the Human Rights Committee* (Brill 2004).

[103] Pobjoy (n 90) 210.

[104] This element is inexplicably missing from the third prong of Pobjoy's test.

[105] And, if one accepts McAdam's thesis that beneficiaries of complementary protection enjoy 1951 Convention rights, then as between them and refugees recognised under article I(2) of the 1969 Convention.

[106] Optional Protocol to the ICCPR, UNGA Res 2200A (XXI) of 16 December 1966 (entered into force 23 March 1976) 999 UNTS 302.

guaranteed without discrimination between citizens and aliens'.[107] All refugees, therefore, benefit from the protection of the ICCPR.

As a starting point, assume that state X—which is party to the 1951 Convention, the 1969 Convention and the ICCPR and its optional protocol—guarantees the full range of 1951 Convention rights to refugees under that instrument but guarantees refugees recognised under article I(2) of the 1969 Convention only the few rights contained therein (*non-refoulement*, to voluntary repatriation and to a travel document).[108] The first prong of the test, which must establish that similarly situated individuals have been treated differently, is clearly answered in the affirmative. Once in state X, a refugee who fled individualised persecution is no different from one who fled a 1969 Event. The two, as refugees, are in similar circumstances, yet they do not enjoy the same allocation of rights.

To establish discrimination, the test's second prong must demonstrate that the unequal treatment is based on a ground captured by article 26. The unequal treatment by state X is based on the source of the individual's refugee status. This is not one of the grounds enumerated in article 26, however the listing there is not exhaustive. The source of the unequal treatment may fall within 'any other status'. The HRC has approached the meaning of 'any other status' on a case-by-case basis. The only general requirement is that the status in question must capture a distinct group, as opposed to an individual.[109] Refugees recognised under article I(2) of the 1969

[107] HRC, 'General Comment No 15: The Position of Aliens Under the Covenant' (11 April 1986) para 2.

[108] 1969 Convention (n 2) arts II(3), V(1) and VI(1).

[109] *Vos v Netherlands* comm no 218/1986 (29 March 1989) UN Doc CCPR/C/35/D/218/1986.

Convention are clearly a distinct group. Moreover, according to Pobjoy, because the HRC has repeatedly affirmed that distinctions based upon nationality or citizenship fall within the notion of 'other status' in article 26, it 'seems reasonable to assume that this principle would apply between different categories of non-citizens'.[110] The second prong of the test is therefore also answered affirmatively.

Under the test's third prong, to avoid running afoul of the ICCPR the unequal allocation of rights must be based on reasonable and objective criteria and must be in pursuit of a legitimate aim. Owing to the paucity of jurisprudence on the issue, '[t]he extent to which the Committee is likely to consider differential treatment between categories of non-citizens to be reasonable and objective is unclear'.[111] In the absence of case law, Pobjoy finds that the most sensible approach is to 'identify the potential bases which a state may invoke to justify the differential allocation of rights … and … critically examine these bases to pre-empt the likelihood that they will be considered reasonable and objective criteria justifying the differential allocation of rights'.[112] The only conceivable basis on which state X might decide to circumscribe the rights of article I(2) refugees would be the belief that their plight is inherently more temporary than refugees fleeing individualised persecution. Such logic has been employed to justify the lower standards of treatment accorded to beneficiaries of complementary (subsidiary) protection under the European Union's Qualification Directive.[113] This belief is not, however, borne out in practice. The increasingly

[110] Pobjoy (n 90) 215.

[111] ibid 216.

[112] ibid 218.

[113] ibid 221.

protracted nature of refugee situations in Africa[114] and the persistence of the conflicts giving rise to many of them[115] have been amply documented. Moreover, to accord fewer rights to refugees fleeing a 1969 Event on the theory that their plight is inherently temporary misconceives the nature of the universal regime of refugee protection, which itself is premised on temporariness. Because the denial of 1951 Convention rights to article I(2) refugees cannot be based on criteria that are objective and reasonable, there is no need to proceed to the test's second sub-prong regarding legitimate aims. The test's third prong is answered in the negative.

The application of this test suggests that distinguishing in the allocation of rights between article I(2) refugees and refugees recognised under article 1A(2) of the 1951 Convention constitutes unlawful discrimination under the ICCPR. UNHCR takes a similar position in more general terms, finding it 'doubtful that international law would permit selective provision of international protection according to category'.[116] Indeed, the 1969 Convention itself recalls 'that the Charter of the United Nations and the Universal Declaration of Human Rights have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination'.[117] There is arguably, therefore, a duty to guarantee 1951 Convention rights to article I(2) refugees in African states party to the ICCPR and both refugee

[114] See, for example, Edwin Odihambo Abuya, 'From Here to Where? Refugees Living in Protracted Situations in Africa' in Alice Edwards and Carla Ferstman (eds), *Human Security and Non-Citizens: Law, Policy and International Affairs* (CUP 2010); Jeff Crisp, 'No Solution in Sight: The Problem of Protracted Refugee Situations in Africa' in Itaru Ohta and Yntiso D Gebre (eds), *Displacement Risks in Africa: Refugees, Resettlers and Their Host Population* (Kyoto University Press 2005).

[115] See, for example, Gerard Prunier, *From Genocide to Continental War: The 'Congolese' Conflict and the Crisis of Contemporary Africa* (Hurst 2009).

[116] UNHCR, 'Towards a Common European Asylum System' in CDU de Sousa and P de Bruycker (eds), *The Emergence of a European Asylum Policy* (Bruylant 2004), cited in McAdam (n 39) 221.

[117] 1969 Convention (n 2) preambular para 6.

conventions. This conclusion is, however, tentative, as the HRC has never ruled on the issue, and there is limited jurisprudence concerning the differential allocation of rights among categories of non-citizen.[118] Indeed, it is unlikely that the issue of discrimination against article I(2) refugees would ever come before the HRC, since states in Africa do not, in practice, distinguish between refugees recognised under article 1A(2) of the 1951 Convention and those recognised under article I(2) of the 1969 Convention. Nor does domestic refugee legislation in Africa generally make such a formal distinction. These facts are considered in the discussion of state practice in the section that follows.

4. The law of treaties and general international law

Aspects of the text of the 1969 Convention, considered in light of several principles of the law of treaties, are instructive in determining the rights to which refugees recognised under article I(2) of the 1969 Convention are entitled. The relevant treaty law principles are the rule on the application of successive treaties relating to the same subject matter,[119] the general rule of interpretation[120] and the rule on supplementary means of interpretation.[121] Certain general principles of international law are also relevant. Each is addressed in turn below.

[118] Pobjoy (n 90) 210.

[119] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 30.

[120] ibid art 31.

[121] ibid art 32.

(a) Article 30 of the Vienna Convention: successive treaties relating to the same subject matter

Article 30 of the Vienna Convention addresses the question of the relationship between successive treaties relating to the same subject matter. This provision, while primarily invoked to resolve explicit conflicts, is also applicable 'more generally the rights and obligations of States parties to successive treaties relating to the same subject-matter'.[122] However, the strict construction to be given to 'relating to the same subject matter'[123]—language that appears in the sub-paragraph addressing the general applicability of article 30—and the residuary character of article 30 in relation to conflict clauses[124] raises the threshold question of whether article 30 is even applicable to the issue at hand.

The 1969 Convention seeks only to regulate matters not already covered by the 1951 Convention,[125] calling into question whether it and the 1951 Convention can be construed as 'relating to the same subject matter'.[126] In this regard, the relationship between the 1951 and 1969 conventions is an example of the main basis on which Sinclair critiques article 30. He notes:

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[122] Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009) 402.

[123] Anthony Aust, *Modern Treaty Law and Practice* (2nd edn, CUP 2007) 229; Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed, Manchester University Press 1984) 98; contra: Fragmentation Report (n 5) paras 253–4.

[124] Aust (n 123) 227; Fragmentation Report (n 5) para 251; Sinclair (n 123) 97; Villiger (n 122) 403.

[125] See chapter 2 and Rwelamira (n 47) 167.

[126] See, generally, Christopher J Borgen, 'Resolving Treaty Conflicts' (2005) 37 Geo Wash Intl LR 573 & 603; contra: Fragmentation Report (n 5) para 22.

> [a]rticle 30 of the Vienna Convention is in many respects not entirely satisfactory. The rules laid down fail to take account of the many complications which arise when there coexist two treaties relating to the same subject-matter, one negotiated at the regional level … and another negotiated within the framework of a universal organisation.[127]

Furthermore, article 30 is residual in the sense that it only applies 'in the absence of express treaty provisions regulating priority'.[128] That is to say that where a treaty expressly provides how it should relate to another instrument,[129] article 30 does not apply. The 1969 Convention contains two provisions that may reasonably be viewed as conflict clauses. Article VIII(2) provides that the 1969 Convention 'shall be the effective regional complement in Africa' of the 1951 Convention, while preambular paragraph 9 recognises that the 1951 Convention, as modified by the 1967 Protocol, 'constitutes the basic and universal instrument relating to the status of refugees and reflects the deep concern of States for refugees and their desire to establish common standards for their treatment'.

Thus while article 30's sub-paragraphs (3) and (4) on construing the relationship between successive treaties relating to the same subject matter do not apply, its second sub-paragraph confirms the primacy of the 1969 Convention's conflict clauses. Article 30(2) of the Vienna Convention concerns conflict clauses aimed at giving priority to another treaty. It provides, '[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail'. According to Villiger, 'on the contractual level, the residual character of Article 30 *vis-à-vis* the conflict clause of

[127] Sinclair (n 123) 98.

[128] ibid 97.

[129] According to Villiger, conflict clauses may appear 'in the treaty itself, in its preamble, or in an annex' ((n 122) 404).

another treaty may be based on its own para. 2—but only when that conflict clause grants priority to other treaties'.[130] The 1969 Convention's conflict clauses indeed acknowledge the primacy of the 1951 Convention. Article 30(2) therefore mandates that they should govern the resolution of the issue at hand. The proper interpretation of the 1969 Convention's conflict clauses necessitates recourse to the general rule of interpretation.

(b) Article 31 of the Vienna Convention: the general rule of interpretation

The general rule of interpretation provides, 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[131] According to Sinclair, the ordering of elements within this provision is important: 'the initial search is for the 'ordinary meaning' to be given to the terms of the treaty in their 'context'; it *is in light of* the object and purpose of the treaty that the initial and preliminary conclusion must be tested and either confirmed or modified'.[132] The clauses relevant to resolving the issue at hand are, as discussed above, the 1969 Convention's conflict clauses: article VIII(2) and preambular paragraph 9. Also relevant is the 1969 Convention's tenth preambular paragraph, which calls 'upon Member States of the Organization [of African Unity] who had not already done so to accede to the United Nations Convention of 1951 and to the Protocol of 1967 … and meanwhile to apply their provisions to refugees in Africa'.

[130] Villiger (n 122) 403.

[131] Vienna Convention (n 119) art 31(1).

[132] Sinclair (n 123) 130.

In interpreting the relevant provisions in line with their ordinary meaning in context, it becomes clear that article I(2) refugees are entitled to the rights contained in the 1951 Convention. In including a reference in the title of the 1969 Convention to its governance of the 'Specific Aspects of Refugee Problems in Africa'[133] and in recognising the 1951 Convention as 'the basic and universal instrument relating to the status of refugees',[134] the 1969 Convention establishes its predecessor instrument as the global reference point for refugee status in a general sense. In going on to recognise that the 1951 Convention 'reflects the deep concern of States for refugees and their desire to establish *common standards for their treatment*',[135] the 1969 Convention specifically establishes the 1951 Convention as the universal source of refugee rights. This is why, in the preambular paragraph that follows, the 1969 Convention calls on states that have 'not already done so to accede to' the 1951 Convention and 1967 Protocol and to meanwhile 'apply their provisions to refugees in Africa'.[136] Indeed, according to D'Sa,

> the fact that the OAU Convention expressly recognizes the legal status and validity of the UN Convention and encourages the OAU Member States to accede to the latter is … evidence that the OAU Convention does not preclude the application by its Member States of the additional provisions of the UN Convention relating to such matters as gainful employment, welfare, housing, public education, administrative assistance and so on.[137]

The co-application of the 1951 and 1969 conventions that emerges from the latter instrument's preamble is the meaning that must be similarly attributed to the

[133] According to Gardiner, titles 'may occasionally contribute to a specific interpretation' (Richard Gardiner, *Treaty Interpretation* (2nd edn, OUP 2010) 180).

[134] 1969 Convention (n 2) preambular para 9.

[135] ibid (emphasis added).

[136] 1969 Convention (n 2) preambular para 10.

[137] Rose D'Sa, 'The African Refugee Problem, Relevant International Conventions and Recent Activities of the Organization of African Unity' (1984) 31 NILR 378, 390.

final relevant provision, article VIII(2). It provides that the 1969 Convention is the 'effective regional complement in Africa' of the 1951 Convention. As mentioned above, Durieux and Hurwitz find that 'on its face, the only possible interpretation of this provision is that a person recognized as a refugee under [either] branch of the definition in the complementary OAU Convention is entitled to the rights contained in the primary 1951 Convention'.[138] Durieux and McAdam[139] and McAdam[140] reach the same conclusion. Okoth-Obbo explains that by describing itself as the regional complement to the 1951 Convention, the full scope of application of the 1969 Convention 'must be considered as also including the 1951 Convention'.[141] Similarly, Awuku views the language of article VIII(2) as implying that the 1969 Convention does not supersede, but rather that it supplements, the 1951 Convention.[142] Holborn considers article VIII(2), as well as preambular paragraphs 9 and 10, and finds,

> [t]he final text of the 1969 … Convention makes clear that it was drawn up to supplement and not to supersede or conflict with the 1951 Convention and the 1967 Protocol. … The substantive articles of the OAU Convention create obligations to be assumed by contracting states in addition to those they have accepted by becoming parties to the 1951 Convention and 1967 Protocol.[143]

These views suggest that the 1951 and 1969 conventions are co-extensive in states party to both instruments: an individual can be recognised as a refugee under article I(2) of the 1969 Convention, and the rights associated with such status can be derived from the 1951 Convention.

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[138] Durieux and Hurwitz (n 44) 126.

[139] Durieux and McAdam (n 45) 11.

[140] McAdam (n 39) 213.

[141] Okoth-Obbo (n 23) 98.

[142] Emmanuel Opoku Awuku, 'Refugee Movements in Africa and the OAU Convention on Refugees' (1995) 39 J Afr L 79, 81.

[143] Louise W Holborn, *Refugees: A Problem of our Time-The Work of the United Nations High Commissioner for Refugees, 1951-1972*, vol I & II (Scarecrow Press 1974) 188.

This initial interpretation is not vitiated when considered in light of the 1969 Convention's object and purpose, which can be gleaned from the text of the 1969 Convention generally and from its preamble in particular.[144] The preamble begins by '[n]oting with concern the constantly increasing numbers of refugees in Africa' and by stating that signatories are 'desirous of finding ways and means of alleviating … [refugees'] misery and suffering as well as providing them with a better life and future'.[145] It goes on to articulate the 'need for an essentially humanitarian approach towards solving the problems of refugees'.[146] The preamble to the 1969 Convention then mentions the UN Charter and the UDHR,[147] noting that they have 'affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination',[148] and states that African problems 'must be solved in the spirit of' the Charter of the Organization of African Unity (OAU Charter),[149] which itself affirms OAU member state adherence to the UN Charter and the UDHR.[150] These recitals suggest that a form of asylum featuring only the few rights explicitly recognised by the 1969 Convention—*non-refoulement* and the rights to voluntary repatriation and to a travel document[151]—would be manifestly inconsistent with the 1969 Convention's object and purpose of alleviating the suffering of refugees in a humanitarian manner in line with human rights. The preamble thus confirms the

[144] Gardiner (n 133) 192.

[145] 1969 Convention (n 2) preambular para 1.

[146] ibid preambular para 2.

[147] UNGA, Res 217A (III) (10 December 1948).

[148] ibid preambular para 6.

[149] ibid preambular para 8.

[150] Charter of the Organization of African Unity (25 May 1963) 479 UNTS 39 (OAU Charter) preambular para 9.

[151] 1969 Convention (n 2) arts II(3), V(1) and VI(1).

preliminary interpretation reached above: refugees recognised only under article I(2) of the 1969 Convention benefit from the rights enumerated in the 1951 Convention.

The Vienna Convention's article 31 general rule of interpretation includes an enumeration of the other elements that must be taken into account, together with the context. Among them are 'any relevant rules of international law applicable in the relations between the parties'[152] and 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'.[153] Consideration of each of these elements affirms the conclusion reached above.

Article 31(3)(c) of the Vienna Convention: relevant rules of international law

The Vienna Convention mandates the consideration of 'relevant rules of international law' as part of the process of treaty interpretation. This reflects the principle of systemic integration, pursuant to which treaties, as incarnations of international law, are 'limited in scope and … predicated for their existence and operation on being part of the international law system. As such, they must be'[154] 'applied and interpreted against the background of … general principles of international law'.[155] Thus 'every treaty provision must be read not only in its own context, but in the wider context of general international law'.[156] The ILC explains article 31(3)(c) as simply requiring

[152] Vienna Convention (n 119) art 31(3)(c).

[153] ibid art 31(3)(b).

[154] Campbell McLachlan, 'The Principle of Systemic Interpretation and Article 31(3)(c) of the Vienna Convention' (2005) 54 Intl & Comp LQ 279, 280.

[155] Lord McNair, *The Law of Treaties* (OUP 1961), cited in McLachlan (n 154) 280.

[156] Sinclair (n 123) 139.

that a sense of 'coherence and meaningfulness' be integrated into the process of treaty interpretation.[157]

The international law that is 'relevant' consists of those rules—whether emanating from custom, general principles of international law or treaties[158]—that touch 'on the same subject matter as the treaty provision or provisions being interpreted or which in any way affect that interpretation'[159] and that are in force at the time of interpretation.[160] The 1951 Convention and its 1967 Protocol, the UDHR, the ICCPR, the International Covenant on Economic, Social and Cultural Rights[161] and African human rights law[162] thus seem relevant to the interpretation of the 1969 Convention.[163] Their applicability is by no means, however, a foregone conclusion.

International refugee and human rights treaties cannot necessarily be applied to the interpretation of the 1969 Convention, because, according to article 31(3)(c), the 'relevant rules of international law' must be 'applicable in the relations between the parties'. It is not clear whether this reference is to the parties to a dispute over the meaning of a particular treaty or to all the parties to the treaty being interpreted.

[157] Fragmentation Report (n 5) para 419.

[158] Gardiner (n 133) 260–3; Fragmentation Report (n 5) paras 422 & 426.

[159] Gardiner (n 133) 260.

[160] ibid 251; Villiger (n 122) 433. Sinclair provides a less absolute analysis of this issue, however he ultimately concludes that 'there is some evidence that the evolution and development of international law may exercise a decisive influence on the meaning to be given to expressions incorporated in a treaty, particularly if these expressions themselves denote relative or evolving notions such as "public policy" or "the protection of morals"' ((n 123) 139).

[161] Adopted 16 December 1966, entered into force 3 January 1976, 993 UNTS 3.

[162] See chapter 5.

[163] Clark (n 88) 594; Hathaway (n 91) 64–7.

Gardiner's view is that article 31(3)(c) likely refers to the latter.[164] This raises the question of

> whether the focus is on examination of relations between all the parties to the treaty, whether the situation is similar to that of subsequent practice (where the practice must be the concordant practice of a sufficient number of parties coupled with the acquiescence and imputed concurrence of the rest), or whether there is some other interpretation to be given.[165]

In other words, 'is it necessary that *all* the parties to the treaty being interpreted are also parties to the treaty relied upon as the other source of international law for interpretation purposes'?[166] Ultimately, jurisprudence and doctrine on this issue have not produced a clear answer.[167] A related, though somewhat more settled, issue is that of inter-temporal law. That is, the question of what should be the critical date—whether that of adoption of the treaty being interpreted or that at the moment of interpretation—for the assessment of the other rules to be considered under article 31(3)(c). According to Gardiner,[168] the most helpful conclusion on this issue is that of the ILC, which affirms contemporaneity but also allows changes in the law to be taken into account.[169]

These issues of party congruence and inter-temporality aside, it is at the very least arguable that international refugee law and international and African human rights law prevailing at the moment the 1969 Convention is interpreted are relevant to

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[164] Gardiner (n 133) 269.

[165] ibid.

[166] Fragmentation Report (n 5) para 470.

[167] Gardiner (n 133) 269. Note that the ILC proposes that in light of this uncertainty, a better solution would be 'to permit reference to another treaty provided that the *parties in dispute* are also parties to that other treaty' (Fragmentation Report (n 5) para 472).

[168] (n 133) 278.

[169] See Fragmentation Report (n 5) para 475.

such interpretation. This is in line with the ILC's understanding of the principle of systemic integration, which lies at the core of article 31(3)(c) and requires that international obligations be 'interpreted by reference to their normative environment'.[170] Furthermore, Judge Weeramantry of the International Court of Justice has opined that '[t]reaties that affect human rights cannot be applied in such a manner as to constitute a denial of human rights *as understood at the time of their application*'.[171] Invoking present-day international refugee law and international and African human rights law to determine whether article I(2) refugees benefit from 1951 Convention rights reaffirms the conclusion reached above; finding otherwise would be nonsensical, as it would effectively deny article I(2) refugees the human rights to which they are otherwise entitled. Of particular note in applying international refugee law to the interpretation of the 1969 Convention is the preamble to the 1967 Protocol, which provides that '*equal status* should be enjoyed by all refugees', including those who were recognised as a result of 'new refugee situations [that] have arisen since the [1951] Convention was adopted'.[172] Applying this provision in interpreting the 1969 Convention clearly suggests that the rights framework under the 1969 Convention should be derived from the 1951 Convention.

Article 31(3)(b) of the Vienna Convention: subsequent practice

The subsequent state practice referred to by article 31(3)(b) includes domestic

[170] Fragmentation Report (n 5) para 413.

[171] *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7, 114–5 (emphasis added).

[172] Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267, preambular paras 3 & 4 (emphasis added).

legislation.[173] Among African states that have incorporated the 1951 and 1969 conventions, many have done so in such a way that affirms that 1951 Convention rights apply to article I(2) refugees.[174] Uganda's Refugees Act, 2006,[175] for example, includes both the 1951 Convention refugee definition and that articulated at article I(2) of the 1969 Convention, and guarantees both types of refugee a range of rights derived from the 1951 Convention.[176] The same is true of refugee legislation in South Africa[177] and Tanzania,[178] among other states.

It must be noted, however, that commentary on the Vienna Convention has clarified that the subsequent practice referred to by article 31(3)(b) must be common to all the parties to the treaty sought to be interpreted.[179] Not all states party to the 1969 Convention afford article I(2) refugees 1951 Convention rights. Libya, for example, is party to the 1969 but not the 1951 Convention; 1969 Convention refugees there are not, therefore, entitled to 1951 Convention rights. This is not to say that domestic refugee legislation in Africa is of no value in interpreting the 1969 Convention. Subsequent practice that is not common to all parties may nevertheless 'constitute a supplementary means of interpretation within the meaning of Article 32

[173] Guy S. Goodwin-Gill, 'The Search for the One, True Meaning...' in Guy S Goodwin-Gill and Hélène Lambert (eds), *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (CUP 2010) 214.

[174] McAdam (n 39) 213.

[175] Uganda (n 6).

[176] See Sharpe and Namusobya (n 11).

[177] The Refugees Act 1998 (South Africa) No 130 of 1998.

[178] Mandal (n 38) xii.

[179] See, for example, Aust (n 123) 241–3; Gardiner (n 133) 227; Goodwin-Gill (n 173) 209; Sinclair (n 123) 138.

of the [Vienna] Convention',[180] which is addressed below.

(c) Article 32 of the Vienna Convention: supplementary means of interpretation

Recourse may be had to supplementary means of interpretation in order to confirm the meaning flowing from the application of the general rule of interpretation.[181] Supplementary means include, but are not limited to, the preparatory work of the treaty and the circumstances of its conclusion.[182] Several sources are relevant in this regard. First, in 1980, an OAU and UNHCR working group promulgated guidelines to assist OAU member states in incorporating their obligations under the 1969 Convention.[183] According to section 11 of these guidelines, 'persons considered as refugees according to the "extended" OAU refugee definition are entitled to the rights and are subject to the duties defined [in] the 1951 … Convention'.[184] A second supplementary means of interpretation, already discussed above, is the domestic refugee legislation of states party to the 1969 Convention. Third, and most important, is the history of the 1969 Convention. While no official set of *travaux préparatoires* is available for the 1969 Convention, its drafting history, detailed in chapter 2, supports the interpretation reached here: the 1969 Convention does not create second-class refugees excluded from the 1951 Convention's rights framework.

[180] Sinclair (n 123) 138.

[181] Vienna Convention (n 119) art 32.

[182] ibid.

[183] Ivor C Jackson, *The Refugee Concept in Group Situations* (Martinus Nijhoff 1999) 194; see chapter 6, section B.2.

[184] ibid 195.

(d) General principles of international law

This conclusion, reached by interpreting relevant clauses of the 1969 Convention in line with the Vienna Convention, is confirmed by relevant general principles of international law. These are 'general principles of municipal jurisprudence, in particular of private law, in so far as they are applicable to relations of States'.[185] Two such general principles of international law relate to the possibility of characterising the 1969 Convention as a special regime in relation to the 1951 Convention's more general legal regime.

First, it is usually possible to contract out of a general international legal regime unless the general regime is *jus cogens*, or the special regime purports to deviate from law that benefits third parties (such as individuals), is of an *erga omnes* character[186] or is of a public law nature.[187] The 1951 Convention legal regime possesses most of these characteristics: individual refugees benefit from it and the obligations under it and are of a public law nature. The 1951 Convention legal regime is therefore one of the limited general international legal regimes that states may not contract out of by creating a special regime. Accordingly, African states may not, in the context of their regional refugee law regime, contract out of those refugee rights they agreed to protect under the more general 1951 Convention regime.

[185] Ian Brownlie, *Principles of Public International Law* (6th edn, OUP 2003) 16.

[186] An obligation *erga omnes* 'is owed to the "international community as a whole" and all States—irrespective of their particular interest in the matter—are entitled to invoke State responsibility in case of breach' (Fragmentation Report (n 5) para 380).

[187] Fragmentation Report (n 5) para 154.

Second, according to the ILC, 'the scope of special laws is by definition narrower than that of general laws. It will thus frequently be the case that a matter not regulated by special law will arise in the institutions charged to administer it. In such cases, the relevant general law will apply'.[188] The special 1969 Convention regime does not detail the rights to which refugees are entitled once they are recognised as such because, as explained above, to do so would represent an unlawful deviation from the more general 1951 Convention regime. Because the 1969 Convention does not detail post-recognition refugee rights, the 1951 Convention's general regime serves to fill the gap, as described in general terms by the ILC.

The general principle of *lex posterior derogat legi priori*, though not strictly applicable because the parties to the 1951 and 1969 conventions are not identical, is nevertheless also instructive. It provides that an earlier treaty applies only to the extent that it is not inconsistent with a later treaty concluded among the same parties.[189] The application of 1951 Convention rights to article I(2) refugees is not inconsistent with the 1969 Convention; indeed, the applicability of the 1951 Convention's rights framework to 1969 Convention refugees is in keeping with the object and purpose of the 1969 Convention. This, and the analysis above, implies that in states party to both the 1951 and 1969 Conventions, there can be no suggestion that 1969 Convention refugees enjoy fewer rights than their 1951 Convention counterparts. This is the main issue relating to the relationship between the 1951 and 1969 Conventions. However, other isolated issues also arise. The following section focuses on them.

[188] ibid para 15.

[189] ibid para 24.

D. OTHER ASPECTS OF THE RELATIONSHIP BETWEEN THE 1951 AND 1969 CONVENTIONS

In addition to the major procedural and substantive issues discussed above, the simultaneous applicability of the 1951 and 1969 conventions in many African jurisdictions gives rise to a number of more isolated relationship issues. These can be divided into two broad categories. In the first category the relationship issues are complementary: one instrument makes provision for an issue on which the other is silent, or addresses a common issue more generously. The ILC terms these 'relationships of interpretation', in which 'one norm assists in the interpretation of another'.[190] In the second category are conflicts between the 1951 and 1969 conventions. In relationships of conflict 'two incompatible norms point to opposite conclusions'.[191] Each category is addressed in turn.

1. Relationships of interpretation

When it is the 1969 Convention that affords refugees more generous or robust protection than the 1951 Convention, the latter instrument's article 5 is dispositive. Chapters 2 and 3 discussed aspects of the 1969 Convention that are somewhat more generous than the 1951 Convention—the scope of the non-discrimination and *non-refoulement* provisions—or address issues about which the 1951 Convention is silent—temporary protection and voluntary repatriation. The 1951 Convention's article 5 speaks directly to such provisions: '[n]othing in this Convention shall be

[190] International Law Commission, 'Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (2006) 2 UNYBILC 175, para 2.

[191] ibid.

deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention'. Such 'rights and benefits' may result from another treaty (or from municipal law).[192] It is thus clear that when the 1969 Convention puts refugees in a more favourable position than they would have been under the 1951 Convention alone, the more generous provisions of the regional instrument apply.

(a) The 'compelling reasons' proviso

The 1969 Convention does not contain any provision analogous to the 1951 Convention's article 5. Thus when the 1951 Convention is the more generous or robust instrument, the relationship between the treaties must be articulated through a process of treaty interpretation. Besides the 1969 Convention's lack of a refugee rights framework and the 1951 Convention's detailed provisions in this regard, which was addressed at length above, the other significant instance in which the 1951 Convention addresses an issue on which the 1969 Convention is silent relates to the cessation clauses. As noted in chapter 2, the 1969 Convention does not include the 1951 Convention proviso preventing the cessation of an individual's refugee status if he or she can 'invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality'.[193] This leads to the question of whether a refugee recognised only under article I(1) of the 1969 Convention could raise such 'compelling reasons' in the face of an invocation by his or her country of asylum of the 1951 Convention article 1C(5) ceased circumstances

[192] Atle Grahl-Madsen, *Commentary on the Refugee Convention* (UNHCR 1963) 14.

[193] 1951 Convention (n 1) art 1C(5).

clause, assuming the host state invoked the clause in respect of all refugees, not just those recognised pursuant to the 1951 Convention.

In answering the question of whether a 1969 Convention refugee could invoke 'compelling reasons arising out of previous persecution' to mitigate the applicability of the ceased circumstances cessation clause, it is useful to begin by considering why the 1969 Convention does not include the 1951 Convention's 'compelling reasons' proviso. The answer seems clear: the 1969 Convention's article I(4) cessation clauses—which except for the omission of the 'compelling reasons' proviso otherwise mirror the 1951 Convention provisions—apply to both article I(1) and article I(2) refugees. Refugee status under the latter regional definition does not depend on persecution. The 'compelling reasons' proviso, by contrast, relates to past persecution. It would have been incoherent to include this proviso in a generally applicable cessation clause, given that that it could only ever be invoked by a sub-set of 1969 Convention refugees: those who had fled persecution and, accordingly, were recognised under article I(1). Furthermore, the 1951 Convention's cessation clauses were likely included in the 1969 Convention to make them apply to the article I(2) refugee definition. Because there was no need to make the 'compelling reasons' proviso applicable to article I(2)—and indeed to do so would not have made sense—there was no reason to include the proviso in the 1969 Convention. Finally, on the language of article 1C(5) alone, the compelling reasons proviso applies only to article 1A(1) statutory refugees; as interpreted today, the proviso applies equally to article 1A(2) refugees.[194] If in the 1960s, when the 1969 Convention was being drafted, the proviso was still interpreted textually as applying only to statutory

[194] Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 145–9.

refugees, it would have had no bearing in the context of the regional instrument. Thus the 1951 Convention's 'compelling reasons' proviso was not omitted from the 1969 Convention to prevent 1969 Convention refugees from benefitting from it. Rather, it was omitted because the proviso is incompatible with, or at the time of drafting was irrelevant to, the article I(2) refugee definition.

Given that there was never any intention to deprive refugees in Africa of the ability to invoke the 'compelling reasons' proviso, it becomes clear that the issue of whether 1969 Convention article I(1) refugees may invoke it can be resolved in the same manner as the issue of the rights to which 1969 Convention refugees are entitled. The possibility that the 1951 Convention is the *lex specialis* for all persons in need of international protection,[195] the equality principle[196] and the interpretation of the 1969 Convention[197]—which makes clear that the 1951 Convention is the 'basic and universal instrument relating to the status of refugees'[198] and the 1969 Convention is its 'regional complement in Africa'[199]—indicate that 1969 Convention article I(1) refugees may invoke the 1951 Convention's 'compelling reasons' proviso. Moreover, as mentioned above, the instrument and definition under which a refugee from persecution is recognised—whether the 1951 Convention's article 1A(2) or the 1969 Convention's article I(1)—is a procedural question that often depends on purely

[195] See section C.2.

[196] See section C.3.

[197] See section C.4.

[198] 1969 Convention (n 2) preambular para 9.

[199] ibid art VIII(2).

pragmatic considerations;[200] such a procedural issue should have no effect on substantive rights.

State practice affirms this conclusion. Further to UNHCR's recommendation, on 30 June 2013, Zambia[201] terminated the refugee status of Rwandans who had fled between 1959 and 1998. All refugees affected by this declaration of cessation—regardless of the instrument and provision pursuant to which refugee status had been recognised—were, in the context of exemption procedures developed in line with relevant UNHCR[202] and ExCom[203] guidance, given the opportunity to present compelling reasons mitigating against cessation.[204] Municipal refugee legislation also makes the 'compelling reasons' proviso available to all refugees. Uganda's Refugees Act, 2006, for example, includes the 1951 Convention and regional refugee definitions and makes its ceased circumstances cessation clause applicable only to those among them 'without compelling reasons arising out of previous persecution'.[205] Similarly, South Africa's Refugees Act, 1998 includes both refugee definitions and makes its ceased circumstances cessation clause inapplicable to any refugee with compelling reasons arising out of previous persecution for

[200] See section B.

[201] Along with Malawi, the Republic of Congo and Zimbabwe.

[202] UNHCR, 'Guidelines on Exemption Procedures in respect of Cessation Declarations' (2011).

[203] ExCom Conclusion No 69 (XLIII), 'Cessation of Status' (1992).

[204] Electronic correspondence with Katele Kalumba, Senior Legal Advisor, Office of the Commissioner for Refugees, Ministry of Home Affairs, Zambia, 6 November 2013.

[205] Uganda (n 6) s 6(1)(e).

refusing to avail him or herself of the protection of his or her country of nationality.[206]

UNHCR shares this view. Its Guidelines on Exemption Procedures in respect of Cessation Declarations note that although the 1969 Convention 'does not contain a provision which allows for exemption due to "compelling reasons"', this exception should be viewed as subsumed by article I(4)(e) of the 1969 Convention because 'the OAU Convention complements the 1951 Convention and the close connection between the purposes of the African Union and the United Nations are recognized'.[207]

2. Relationships of conflict

The drafting history of the 1969 Convention presented in chapter 2 demonstrated that the initiative to create a regional refugee treaty was initially directed at making the 1951 Convention applicable in Africa. Subsequent to the adoption of the 1967 Protocol, it became about addressing refugee issues particular to Africa. As a result, the 1951 and 1969 conventions are a mutually supportive set of instruments, or what Fitzmaurice has called a 'chain' of treaties, which 'grapple with the same type of problem at different levels or from particular (technical, geographical) points of view'.[208] In such contexts, 'specific norms must be read against other norms bearing upon those same facts as the treaty under interpretation'.[209] Thus while there are some

[206] South Africa (n 177) s 5(2).

[207] UNHCR (n 202) n 7.

[208] GG Fitzmaurice, 'Third Report' (1958) II UNYBILC 44, cited in Fragmentation Report (n 5) para 416.

[209] Fragmentation Report (n 5) para 416.

inconsistencies between the two instruments, these can usually be reconciled by seeking a harmonising interpretation.

In isolated instances, however, such inconsistencies rise to the level of a norm conflict. The appropriate interpretive maxims for resolving such conflicts were discussed generally in the introductory chapter 1. Regarding the inconsistencies discussed below, *lex specialis* is the appropriate interpretive maxim; *lex posterior*[210] is not applicable because the parties to the later 1969 Convention are different from the parties to the earlier 1951 Convention,[211] and *lex superior* is not applicable because none of the norms at issue are hierarchically superior norms. It is important to recall, however, that the invocation of *lex specialis* does not result in the more specialist 1969 Convention norm simply extinguishing the conflicting 1951 Convention rule. When *lex specialis* is applied, the special indeed steps in to become applicable instead of the general, but such 'replacement remains … always only partial. The more general rule remains in the background providing interpretative direction to the special one'.[212] With this background in place, each of the inconsistencies between the 1951 and 1969 conventions is addressed in turn.

(a) Freedom of movement

The 1951 Convention's article 26 on freedom of movement provides that each 'Contracting State shall accord to refugees lawfully in its territory the right to choose

[210] See section C.4.d.

[211] Fragmentation Report (n 5) para 243.

[212] ibid para 102.

their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances'. Article II(6) of the 1969 Convention, by contrast, provides that for 'reasons of security, countries of asylum shall, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin'. This suggests that the 1969 Convention permits states parties to determine where refugees shall reside, and indeed such is the practice of some African states. Under Uganda's Refugees Act, 2006, for example, refugees must live in one of the country's several rural refugee 'settlements', the euphemistic name for what are really refugee camps.[213]

As mentioned in the introductory chapter, this work employs a wide notion of norm conflict, in line with the ILC's approach. Thus a conflict exists 'where two rules or principles suggest different ways of dealing with a problem'.[214] Under this definition, article II(6) of the 1969 Convention is clearly in conflict with article 26 of the 1951 Convention. The Vienna Convention's general rule of interpretation mandates consideration of the ordinary meaning of treaty terms in their context and in light of the instrument's object and purpose.[215] Nowhere in article II(6) are states parties implored to settle refugees; the provision merely states that if states do so—which presumably would be in extenuating circumstances—it should be at a reasonable distance from the border with the country of origin. This ordinary meaning is affirmed by the context and by the 1969 Convention's object and purpose, both of which can be gleaned from the instrument's preamble. In stressing the humanitarian

[213] Sharpe and Namusobya (n 11) 569.

[214] Fragmentation Report (n 5) para 25.

[215] Vienna Convention (n 119) art 31(1).

approach that should be taken to refugee problems[216] and human rights, which are mentioned directly[217] and invoked by reference to the OAU Charter,[218] the preamble confirms that the 1969 Convention should not be interpreted to deprive refugees of their freedom of movement. This is further confirmed by the application of the Vienna Convention's article 31(3)(c), which mandates a consideration of 'relevant rules of international law applicable in the relations between the parties'. While certain aspects of this exhortation remain unclear, as discussed above it is at least arguable that this mandates a consideration of international refugee law and international and African human rights law.[219] All of these enshrine freedom of movement,[220] with the 1951 Convention limiting the freedom only insofar as it is limited with respect to aliens generally in the same circumstances and the ICCPR permitting derogations from freedom of movement only where necessary to protect critical national interests.[221]

The same interpretive result is reached by recourse to *lex specialis*. While the 1969 Convention is the *lex specialis* on the freedom of movement of refugees in Africa, as mentioned above its article II(6) must be interpreted with reference to the 1951 Convention rule on the subject. Elaborating on this point, the ILC stresses that the 'important point … is that when *lex specialis* is invoked as an exception to the

[216] 1969 Convention (n 2) preambular para 2.

[217] ibid preambular para 6.

[218] ibid preambular para 8; preambular para 9 of the OAU Charter (n 150) reaffirms OAU member state adherence to the UN Charter and the UDHR.

[219] See section C.4.b.

[220] 1951 Convention (n 1) art 26; ICCPR (n 95) art 12(1); African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58, art 12(1).

[221] ICCPR (n 95) art 12(3).

general law then what is being suggested is that the special nature of the facts justifies a deviation from what otherwise would be the "normal" course of action'.[222] This suggests that the joint effect of the 1951 and 1969 conventions is that in 'normal' circumstances, refugees are free to move and establish residence within their host state, however the 1969 Convention acknowledges that in certain unusual circumstances, such may not be possible. The 1951 Convention provides the general rule, and the 1969 Convention applies only when the facts at hand render the general rule untenable. The refugee crisis that engulfed the DRC during and following the 1994 Rwandan genocide provides an example. In the aftermath of the genocide, camps in the eastern DRC hosted approximately 1.5 million Rwandan refugees,[223] a situation among the most complex humanitarian emergencies in modern times. Clearly it would have been difficult, if not impossible, for the DRC to accommodate so many refugees on a self-settlement basis. The 1969 Convention acknowledges that when circumstances such as these necessitate the coordinated settlement of refugees, their safety is best ensured by situating them far from the border with the country of origin.

The same conclusion was reached by Grahl-Madsen in his brief consideration of this issue, which constitutes an early and rare example of scholarly reflection on the relationship between the 1951 and 1969 conventions. Interestingly, Grahl-Madsen finds that the settlement of refugees would only be permissible 'in cases where there exists a real concern that the refugees in question may engage in subversive

[222] Fragmentation Report (n 5) para 105.

[223] Prunier (n 115) 25.

activities'.[224] Unfortunately, he does not explain this focus on subversion at the expense of other considerations that might warrant encampment, such as refugees' safety or the urgent delivery of humanitarian assistance. He goes on to conclude, as above, that in the absence of a concern about subversion, the 'application of Article II(6) would probably conflict with the provisions of Article 26 of the Refugee Convention'.[225]

(b) Freedom of association

The 1951 Convention includes a provision on the 'right of association'.[226] At the same time, the 1969 Convention prohibits refugees from engaging in 'any subversive activities against any Member State of the OAU'[227] and exhorts contracting states to prohibit refugees on their territories from 'attacking any State Member of the OAU', where 'attack' is broadly construed as including any 'activity likely to cause tension between Member States, in particular by use of arms, through the press, or by radio'.[228] This is further to the 1969 Convention's general aim of discouraging the activities of 'subversive elements'.[229] This, at first blush, suggests a norm conflict. However, the 1951 Convention's article 15 protection of the right of association is so circumscribed that achieving a harmonised interpretation of the two instruments is fairly straightforward.

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[224] Grahl-Madsen (n 28) 48.

[225] ibid.

[226] 1951 Convention (n 1) art 15.

[227] 1969 Convention (n 2) art III(1).

[228] ibid art III(2).

[229] ibid preambular para 5.

Article 15 of the 1951 Convention relates only to 'non-political and non-profit-making associations and trade unions', reflecting the instrument's essential rejection of the more generous conception of freedom of association prevailing under international human rights law.[230] According to Hathaway,

> the best that can be said for Art. 15 is that it is an important affirmation of the rights of refugees—at least once they are lawfully staying, and to the same extent as most-favored foreigners—to undertake quite a broad range of associated activities, including not only the right to join trade unions, but also to participate in the activities of a diverse array of associations, including those with cultural, sporting, social, or philanthropic aims.[231]

It is difficult to conceive of trade union or sporting association activities, for example, that would constitute 'subversion' within the meaning of the 1969 Convention. The real conflict arises between international and regional refugee law, on the one hand, and international and regional human rights law, on the other. This is considered in the following chapter.[232]

(c) The provision of travel documents

Article 28 of the 1951 Convention mandates contracting states to 'issue to refugees lawfully staying in their territory travel documents … unless compelling reasons of national security or public order otherwise require'. Article VI of the 1969 Convention provides substantially the same, except the entire provision is made '[s]ubject to Article III'—the prohibition of subversive activities—presumably to prevent travel undertaken with the objective of attacking another state. This implies that states parties to the 1969 Convention need not issue a travel document to any

[230] See, for example, ICCPR (n 95) art 22(1).

[231] Hathaway (n 91) 891.

[232] See chapter 5, section D.2.a.

refugee who has engaged or is expected to engage in subversive activities. It might seem that these provisions are in conflict insofar as 'subversive elements' are concerned, however, as with freedom of association, it is not difficult to reach a harmonised interpretation of the two articles. All that is required is that the 'compelling reasons of national security or public order' referred to in the 1951 Convention's article 28 are understood to include 'subversive activities' within the meaning of the 1969 Convention, with the result that article III of the 1969 Convention should be strictly construed.

E. CONCLUSIONS

This chapter has addressed the numerous procedural and substantive aspects of the relationship between the 1951 and 1969 conventions. On the procedural side, the various approaches to RSD in states party to both conventions were surveyed. Then substantive aspects of the relationship were addressed. The most salient among these is the rights to which refugees recognised only under the 1969 Convention are entitled; a more isolated issue is whether 1969 Convention article I(1) refugees may invoke the 1951 Convention's 'compelling reasons' proviso to mitigate the application of the ceased circumstances cessation clause. The analysis demonstrated that the 1969 Convention was not drafted with a view to providing an expanded class of individuals in Africa with a more restricted set of rights than their international counterparts, in terms of refugee rights in general and in terms of a refugee's rights in the face of cessation in particular. Rather, '[t]he substantive articles of the … regional agreement are intended to create obligations to be assumed by states which are parties to it *in addition* to those undertaken by becoming parties to the [1951] Convention

and the [1967] Protocol.'[233] Thus the 1969 Convention was innovative not only in addressing refugee protection issues particular to Africa, most notably by incrementally expanding the range of individuals who could qualify for refugee status. In applying the content of the existing universal instrument's status to an expanded class of individuals, the drafters also found a pioneering yet pragmatic way of ensuring that refugees in Africa are guaranteed the same rights as refugees elsewhere.

This approach has been referred to as novel,[234] and as with all novelties, it is not without its complications. Yet this chapter also demonstrated that conflicts between the 1951 and 1969 conventions can be resolved through a harmonising interpretation of the two instruments. This was the case regarding the freedoms of movement and association, and regarding the provision of travel documents.

Another problem, however, is that the complementary relationship between the 1951 and 1969 conventions leaves certain refugees—those in states party to the 1969 Convention but not its universal counterpart, or in states that are party to the 1951 and 1969 conventions but not the 1967 Protocol, or in states party to the 1951 and 1969 conventions that have retained the former instrument's geographical limit [235] —in a precarious situation. Rwelamira explains, 'because the OAU Convention is regarded as complementary to the UN Convention it has no provisions

[233] Chartrand (n 55) 271 (emphasis added).

[234] Bahame Tom Mukirya Nyanduga, 'Refugee Protection Under the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa' (2004) 47 German YB Intl L 85, 93.

[235] Among African states, the Comoros and Libya are party to the 1969 Convention, but not the 1951 Convention; Madagascar is not party to the 1967 Protocol and it and the Republic of Congo recognise the 1951 Convention's geographical limitation to Europe.

dealing with substantive or minimum rights, a problem which becomes real when a state member of the OAU Convention is not a party to the UN Convention'.[236] This is why Goundiam argues that to be effective, the 1969 Convention must be 'completed by states ratifying … other more exhaustive instruments'.[237] Writing around 1970, Goundiam probably had the 1951 Convention in mind. Today, however, international and regional human rights law has an important role to play. The potential of regional human rights law to articulate human rights standards for refugees is the subject of the next chapter, while chapter 7 focuses on the role of regional human rights bodies in redressing violations.

[236] Rwelamira (n 47) 178.

[237] Ousmane Goundiam, 'African Refugee Convention' [1970] Migr News 3, 12.

CHAPTER 5

REGIONAL HUMAN RIGHTS LAW IN REFUGEE PROTECTION

A. INTRODUCTION

The preceding chapters focused on refugee-specific legal instruments. These, however, constitute only part of the regional legal regime for refugee protection in Africa. Human rights law also plays a role. In his treatise on international human rights law in refugee protection, Hathaway called on scholars to 'build upon' his analysis—which is grounded in the 1951 Convention[1] and the two international human rights covenants—to 'define the entitlements of sub-groups of the refugee population entitled to claim additional protections'.[2] This chapter does that for Africa by framing regional human rights law—principally the African Charter[3]—as a source of refugee rights. This is particularly important in the African context, where domestic refugee laws often give refugees only a limited package of rights founded exclusively in the 1951 Convention. The rights framework in Ghana's *Refugee Law, 1992*, for example, provides simply that a 'person granted refugee status in Ghana shall be entitled to the rights and be subject to the duties specified in (a) … [the 1951 Convention]; (b) the … [1967 Protocol] … and (c) the … [1969 Convention]'.[4]

[1] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

[2] James C Hathaway, *The Rights of Refugees Under International Law* (CUP 2005) 8.

[3] Adopted 27 June 1981, entered into force 21 October 1986, 21 ILM 58.

[4] Refugee Law, 1992 (Ghana) PNDCL 305D, s 11.

This chapter begins with a brief review of the literature on the relationship between international human rights law and international refugee law,[5] which charts the evolution of the role of human rights in refugee protection. Section C then goes on to address regional human rights law, beginning with the African Charter. There is an overview of the instrument, followed by a focus on its features that are of particular relevance to refugee protection, in terms of both *non-refoulement* and asylum on the one hand, and rights during the period of refuge on the other. The next part of section C surveys other core regional human rights instruments relevant to refugees. Having articulated the human rights component of the regional legal regime for refugee protection, the chapter then goes on to analyse how the regime's two components—international and regional refugee law on the one hand and regional human rights law on the other—interact. A final section concludes.

B. THE ROLE OF HUMAN RIGHTS LAW IN REFUGEE PROTECTION

The role of human rights law in refugee protection has been steadily evolving. The link between the two fields was initially conceived as causal, with human rights violations viewed as a source of refugee movements.[6] Goodwin-Gill paved the way for a more interactive approach when, in 1989, he viewed refugee protection through the lens of human rights,[7] but developments in this regard progressed slowly. In 1993,

[5] A review of the jurisprudence in this regard is beyond the scope of this thesis. Indeed, a historical-legal review of how refugee and refugee-like situations have been addressed in human rights jurisprudence would constitute another thesis altogether—one that should be written.

[6] Vincent Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in R. Rubio-Marin (ed), *Human Rights and Immigration, Collected Courses of the Academy of European Law* (OUP 2014) 19.

[7] Guy S. Goodwin-Gill, 'International Law and Human Rights: Trends Concerning International Migrants and Refugees' (1989) 23 Intl Migr Rev 526.

Matas explained that while human rights had begun to penetrate the refugee domain, this was occurring 'only fitfully and intermittently. Regrettably, the human rights world and the refugee world, on a day-to-day basis, function separately and apart from one another'.[8] Clark and Crépeau made a similar observation in 1999, noting that the 1951 Convention had for too long 'been treated as a piece of international legislation that could only be interpreted according to its own internal logic and objectives in isolation from international human rights law'.[9] During the 1990s scholars did, however, begin to use human rights norms to inform their interpretation of refugee law concepts, including persecution[10] and *non-refoulement*;[11] by early this century, human rights had significantly broadened the latter concept.[12] Human rights law was also invoked to provide the redress absent from refugee law, because the 1951 Convention is not supervised by a treaty body.[13]

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[8] David Matas, 'A History of the Politics of Refugee Protection' in Kathleen Mahoney and Paul Mahoney (eds), *Human Rights in the Twenty-first Century: A Global Challenge* (Martinus Nijhoff 1993) 622.

[9] Tom Clark and François Crépeau, 'Mainstreaming Refugee Rights: The 1951 Refugee Convention and International Human Rights Law' (1999) 17 NQHR 389, 389.

[10] James C Hathaway, 'Fear of Persecution and the Law of Human Rights' (1992) 91 Bull Hum Rts 98; James C Hathaway, *The Law of Refugee Status* (Butterworths 1991) chap 4.

[11] See, for example, Clark and Crépeau (n 9); Richard Plender and Nuala Mole, 'Beyond the Geneva Convention: Constructing a De Facto Right of Asylum from International Human Rights Instruments' in Frances Nicholson and Patrick Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (CUP 1999).

[12] For a complete account of this process, see Jane McAdam, *Complementary Protection in International Refugee Law* (OUP 2007).

[13] See, for example, Oldrich Andrysek, 'Gaps in International Protection and the Potential for Redress through Individual Complaints Procedures' (1997) 9 IJRL 392; Chaloka Beyani, 'The Role of Human Rights Bodies in Protecting Refugees' in Anne Bayefsky (ed), *Human Rights and Refugees, Internally Displaced Persons and Migrant Workers: Essays in Memory of Joan Fitzpatrick and Arthur Helton* (Martinus Nijhoff 2005); Joan Fitzpatrick (ed) *Human Rights Protection for Refugees, Asylum-Seekers and Internally Displaced Persons: A Guide to International Mechanisms and Procedures* (Transnational 2002); Saul Takahashi, 'Recourse to Human Rights Treaty Bodies for Monitoring of the Refugee Convention' (2002) 20 NQHR 53.

Most recently, academics have invoked human rights as a source of standards of treatment during the period of asylum, both in a general sense and regarding specific issues. Human rights have, of course, always applied to refugees. According to Gilbert, 'the idea that refugees deserve the traditional human rights in addition to the rights established in the 1951 Convention is not open to dispute'.[14] The literature has not, however, always approached refugee protection with this in mind, perhaps because there was a gap of 15 years between when the 1951 Convention was adopted and the adoption of the two international human rights covenants. This gap also explains why the 1951 Convention is a duty-based rather than human rights-based instrument: 'framing refugee status as involving obligations of states rather than rights of individuals … emerged as a necessity in the absence of legally binding human rights'.[15] Clark and Crépeau were not, therefore, stating the obvious when they explained in 1999 that 'a range of protections beyond the Refugee Convention supplement the Refugee Convention protections against expulsion and refoulement. When on State territory, while claiming refugee status or with recognised refugee status, "everyone" may claim other treaty human rights without discrimination'.[16]

Such treaty human rights are important in five general ways. First, international human rights law protects rights about which the 1951 Convention is silent,[17] such as the freedoms of association and expression. Second, where both international refugee law and international human rights law speak to a particular

[14] Geoff Gilbert, 'Rights, Legitimate Expectations, Needs and Responsibilities: UNHCR and the New World Order' (1998) 10 IJRL 349, 387.

[15] Chetail (n 6) 40.

[16] Clark and Crépeau (n 9) 392.

[17] Chetail (n 6) 45.

right, the latter generally protects the right to a higher standard. For example, non-discrimination protection is broader under the ICCPR[18] than under the 1951 Convention.[19] Third, international human rights law protects rights on an absolute basis. Rights under the 1951 Convention, by contrast, are contingent upon the refugee's degree of attachment to his of her host state and are guaranteed only to the extent that a particular reference group also enjoys the right in question.[20] Fourth, international human rights law must inform how the 1951 Convention is interpreted and implemented.[21] Finally, because it is supervised, international human rights law can provide redress where international refugee law cannot.[22] In addition to these general contributions, certain human rights treaty standards are of particular relevance to refugees. These include procedural rights, which apply during status determination;[23] equality rights, which ensure equality among refugees[24] and between refugees and other non-citizens;[25] and liberty rights, which are important in relation to immigration detention.[26]

[18] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

[19] Chetail (n 6) 49.

[20] See Chetail (n 6) 40–4; Marina Sharpe, 'The 1951 Refugee Convention's Contingent Rights Framework and Article 26 of the ICCPR: A Fundamental Incompatibility?' (2014) 30 Refuge 5.

[21] Clark and Crépeau (n 9).

[22] Chetail (n 6) 61–8; see, also, n 13.

[23] Chetail (n 6) 35 & 51–4.

[24] Sharpe (n 20).

[25] Jason Pobjoy, 'Treating Like Alike: The Principle of Non-Discrimination as a Tool to Mandate the Equal Treatment of Refugees and Beneficiaries of Complementary Protection' (2010) 34 MULR 181.

[26] See, generally, Daniel Wilsher, *Immigration Detention: Law, History, Politics* (CUP 2012).

These general and specific contributions of international human rights law to refugee protection have led scholars to view refugee rights under international law as constituted by the simultaneous applicability of international refugee and human rights law. Leading the charge in this regard is Hathaway, whose treatise on the topic explains that 'the development of a pervasive treaty-based system of international human rights law has filled many critical gaps in the Refugee Convention's rights regime'.[27] This is not to say, however, that the 1951 Convention has been entirely supplanted by human rights law. To the contrary, in Hathaway's view, the 1951 Convention remains of critical importance because 'treaty-based human rights are framed in generic terms' and as such, 'there is a continuing role for the Refugee Convention in responding to the particular disabilities that derive from involuntary migration'.[28]

This approach to the role of human rights in refugee protection, which views the standards of treatment applicable to refugees as deriving from both the 1951 Convention and international human rights law, is the dominant scholarly view and that espoused here. It is not, however, without its detractors. At one extreme, Chetail argues that human rights law is now the core of refugee protection:

> human rights law has radically informed and transformed the distinctive tenets of the [1951] Geneva Convention to such an extent that the normative frame of forced migration has been displaced from refugee law to human rights law. As a result of this systemic evolution, the terms of the debate should be inversed: human rights law is *the* primary source of refugee protection, while the [1951] Geneva Convention is bound to play a complementary and secondary role.[29]

[27] Hathaway (n 2) 110.

[28] ibid.

[29] Chetail (n 6) 22.

At the other end of the spectrum lies McAdam, who argues that the 1951 Convention must remain the primary source of refugee rights because human rights law fails to provide refugees with a status,[30] and because of the 'gap between the theory of human rights and the ability to enjoy those rights'.[31] These extreme views aside, what is beyond debate in the literature is that human rights are now an integral element of refugee protection. The remainder of this chapter addresses the particular contributions of African regional human rights law to refugee protection on the continent, and the relationships of interpretation and of conflict that these contributions give rise to.

C. REGIONAL HUMAN RIGHTS LAW

The corpus of regional human rights law in Africa includes a number of instruments. The leading treatise on human rights law in Africa covers what may be termed the core human rights instruments—the African Charter, the Protocol to the African Charter on the Rights of Women in Africa[32] (Women's Protocol) and the African Charter on the Rights and Welfare of the Child[33] (Children's Charter)—as well as the 1969 Convention and instruments relating to IDPs, indigenous peoples and the environment.[34] Furthermore, in addition to addressing regional human rights law, it treats a range of instruments that have emerged at the sub-regional level, an

[30] McAdam (n 12) 198.

[31] ibid 202.

[32] Adopted 11 July 2003, entered into force 25 November 2005, AU Doc CAB/LEG/66.6.

[33] Adopted 11 July 1990, entered into force 29 November 1999, OAU Doc CAB/LEG/24.9/49(1990).

[34] See Frans Viljoen, *International Human Rights Law in Africa* (2nd edn, OUP 2012).

increasingly important plane for human rights protection in Africa.[35] In this work, the discussion of regional human rights law is limited to the three core instruments, beginning with the most broadly applicable.

1. The African Charter

The African Charter was an OAU initiative. A reference to human rights in its constitutive document notwithstanding,[36] the Charter was the continental organisation's first significant foray into the field. The OAU's interest in human rights at the end of the 1970s was a result of the increased attention being paid to human rights internationally, especially by American President Carter in the context of the Cold War and by the UN and OAU to condemn South Africa's apartheid regime, and as a reaction to the unchecked violations that had occurred in post-independence Central African Republic, Equatorial Guinea and Uganda.[37]

Work towards the African Charter began in 1979 with a proposal by President Léopold Senghor of Senegal and the Mauritian representative, supported by Nigeria and Uganda, that the OAU resolve to commence a process that would lead to the adoption of an African human rights instrument.[38] Drafting began in December of

[35] ibid 469–514; see, generally, Frans Viljoen, 'The Realization of Human Rights in Africa Through Sub-regional Institutions' (1999) 7 Afr YB Intl L 186.

[36] Article II(1)(e) of the OAU Charter (Charter of the Organization of African Unity (25 May 1963) 479 UNTS 39) lists the promotion of 'international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights' as among the OAU's purposes.

[37] Christof Heyns, 'The African Regional Human Rights System: The African Charter' (2003-2004) 108 Penn State L Rev 679, 685; Viljoen (n 34) 158–9.

[38] Viljoen (n 34) 160.

that year when a group of experts, led by Senegalese jurist Keba Mbaye,[39] met in Dakar with a mandate to 'prepare an African charter on human rights based upon an African legal philosophy and responsive to African needs'.[40] They had, as a blueprint for their work, the 'Monrovia Proposal for the Setting up of an African Commission on Human Rights', which was the outcome of the UN-sponsored 'Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa' held in Liberia in September 1979.[41] The Monrovia Proposal was directed at establishing a human rights body and, as a result, it did not articulate any new standards; rather, it merely referred to norms already contained in international instruments.[42] Mbaye's group rejected this approach, preferring to draft a new instrument that would articulate standards suited to the African context.[43] According to D'Sa, the necessity for such specific standards stemmed from cultural differences, such as the African emphasis on community over individuals, and from Africa's particular stage of development.[44] Heyns points to the continental experiences of slavery and colonialism as necessitating region-specific standards.[45]

[39] Christof Heyns and Frans Viljoen, 'An Overview of International Human Rights Protection in Africa' (1999) 15 S Afr J Hum Rts 421, 433.

[40] Richard Gittleman, 'African Charter on Human and Peoples' Rights: A Legal Analysis' (1981-1982) 22 Va J Intl L 667, 668; this article contains a brief but excellent drafting history of the African Charter. Note, however, that D'Sa's account of the drafting differs slightly (Rose D'Sa, 'Human and Peoples Rights: Distinctive Features of the African Charter' (1985) 29 J Afr L 72, 73).

[41] Gittleman (n 40) 672.

[42] ibid.

[43] ibid 673.

[44] D'Sa (n 40) 74.

[45] Heyns (n 37) 680.

Despite the drafters' insistence on an instrument reflecting uniquely African norms, the Charter ultimately affirmed international human rights law[46] and international law more generally[47] as relevant sources within the regional system. This is but one example of how elements that have been separated in other contexts coexist within the African Charter. The Charter also includes civil and political rights as well as economic, social and cultural rights; protects individuals and peoples; and enumerates rights and also duties. Perhaps this balance has contributed to the African Charter's almost universal acceptance among AU member states. The Charter was adopted in 1981 and entered into force five years later, and has now been ratified by all AU member states except the newest, South Sudan.

The African Charter is set out in three parts. Chapters I and II of Part I deal with rights and duties respectively. Part II includes four chapters, the first of which creates the African Commission, which was ultimately established in 1987 and was supplemented, by way of a 1998 protocol,[48] by the Interim Court. This latter body will eventually be replaced by the Merged Court; the Commission and both courts are the subject of chapter 7, though the Commission's treatment of relevant Charter provisions is discussed here. Chapter II of Part II sets out the Commission's mandate, while Chapter III establishes its procedure. The final Chapter of Part II articulates the principles governing Commission. Part III of the Charter contains general provisions.

[46] African Charter (n 3) art 60.

[47] ibid art 61.

[48] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004) OAU Doc OAU/LEG/EXP/AGCHPR/PROT.

The African Charter contains several distinctive features. As mentioned above, it includes protections that have elsewhere been bifurcated. The inclusion of civil and political rights alongside economic, social and cultural rights has been praised for stressing the indivisibility and justiciability of all rights.[49] The Charter's inclusion of socio-economic rights has, however, also been criticised. Heyns notes that only a modest number of such rights have been included[50]—to work under 'equitable and satisfactory conditions', to health and to education[51]—and these have not been framed with the usual internal qualifiers that make socio-economic rights subject only to the standards of 'progressive realisation' and 'available resources'.[52]

Similarly, the Charter does not include general limitation and derogation clauses. Thus under conditions of scarcity or emergency, the Charter is often simply ignored. Moreover, many Charter protections contain clawback clauses, which allow states to restrict the right in question to the extent permitted by domestic law. Clawback clauses are imprecise and therefore do not provide the external check on state behaviour afforded by derogation clauses.[53] Heyns has gone so far as to argue that clawback clauses 'undermine the whole idea of international supervision of domestic law and practices and render the Charter meaningless'.[54] The African Commission has, however, prevented this absurdity by generally interpreting

[49] Viljoen (n 34) 214.

[50] The omission of certain civil and political rights has also been criticised. Heyns and Viljoen note that the Charter fails to protect the rights to privacy, to form trade unions, to free and fair elections and to freedom from forced labour ((n 39) 434).

[51] African Charter (n 3) arts 19–24.

[52] Heyns (n 37) 690–1.

[53] Gittleman (n 40) 692.

[54] Heyns (n 37) 688.

limitations of rights in the complainant's favour.[55] For example, it has interpreted clawback clauses as limiting rights only insofar as the domestic law in question complies with international human rights standards.[56] The Commission has also interpreted one of the Charter's duty provisions as a general limitation clause, as explained below in the discussion of duties.

The African Charter also protects peoples' rights, in particular their rights to existence, to self-determination, to freely dispose of their natural resources, to development, to international peace and security and to a satisfactory environment.[57] D'Sa explains that the inclusion of peoples' rights was a result of the importance the drafters placed on creating a document that would reflect a particularly African conception of human rights.[58] The Charter does not, however, define the concept of a 'people', nor is the term defined in international law more generally, leading Viljoen to characterise it as 'a concept in need of clarity'.[59] The ability of a people to enforce its rights under the Charter depends on a distinctive procedural feature: unlike other regional and international human rights instruments, the African Charter has no individual victim requirement. This has allowed representatives of a people, as well as individuals and non-governmental organisations (NGOs), to bring complaints to

[55] Gino J. Naldi, 'Limitation of Rights Under the African Charter on Human and Peoples' Rights: The Contribution of the African Commission on Human and Peoples' Rights' (2001) 17 S Afr J Hum Rts 109, 112.

[56] *Media Rights Agenda & Others v Nigeria* comm nos 105/93, 128/94, 130/94 and 152/96, 12th Annual Activity Report of the Af Cm HRP (1998) (Media Rights Agenda) para 66.

[57] African Charter (n 3) arts 15–7.

[58] D'Sa (n 40) 77.

[59] Viljoen (n 34) 219.

the African Commission regarding violations of their rights and/or the rights of others.[60]

The final unique feature of the African Charter is its inclusion of individual duties. These duties are owed to others, one's family, one's community, the state and the African and international communities.[61] Different explanations have been proffered for the inclusion of duties. According to D'Sa, duties reflect African cultural values,[62] and this is how Senghor characterised them.[63] Gittleman, by contrast, explains that duties were included to ensure the Charter's broad acceptance:

> the notion of "individual" in a socialist State differs markedly from the notion in a capitalist State. As a result, to ensure the eventual adoption of the Charter by all States, the drafters in Dakar stated that if the individual is to have rights "recognized" by the State, he also must have obligations flowing back to the State.[64]

While some of the Charter's duties are enforceable—for example the duty to pay taxes[65]—others create moral, as opposed to legal, obligations. One seemingly moral duty has, however, been imbued by the African Commission with significant legal meaning. Article 27(2) provides that the 'rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest'. The Commission has interpreted this duty provision innovatively

[60] Rachel Murray, 'International Human Rights: Neglect of Perspective from African Institutions' (2006) 55 Intl & Comp LQ 193, 199.

[61] African Charter (n 3) arts 27–9.

[62] D'Sa (n 40) 77.

[63] Viljoen (n 34) 239.

[64] Gittleman (n 40) 676–7.

[65] African Charter (n 3) art 29(6).

as a general limitation clause, stating that 'the only legitimate reasons for limitations to the rights and freedoms of the African Charter are found in article 27(2)'.[66]

2. The African Charter in refugee protection

The African Charter's guarantees are owed to '[e]very individual … without distinction of any kind such as … national … origin … or any status'[67] and the African Commission has confirmed that Charter rights are owed to nationals and non-nationals alike,[68] and to refugees in particular.[69] Doctrine also confirms this.[70] It is thus settled law that refugees benefit from the protection of the Charter during the period of asylum,[71] and a refugee whose rights have been violated by his or her host state has recourse to the African Commission's individual communications procedure.[72] Indeed, communications have been lodged by refugees, by refugee associations and by NGOs on behalf of refugees.[73] The range of human rights

[66] Media Rights Agenda (n 56) para 68; see, also, *Constitutional Rights Project and Others v Nigeria* comm nos 140/94, 141/94 and 145/95, 13th Annual Activity Report of the Af Cm HRP (1999) para 41.

[67] African Charter (n 3) art 2.

[68] *Rencontre Africaine pour la defense des droits de l'homme (RADDHO) v Zambia* comm no 71/92, 10th Annual Activity Report of the Af Cm HPR (2000) (RADDHO) para 22.

[69] *African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v Guinea* comm no 249/2002, 20th Annual Activity Report of the Af Cm HRP (2005–06) (African Institute) para 68.

[70] See, for example, Gino J. Naldi and Cristiano D'Orsi, 'The Role of the African Human Rights System with Reference to Asylum Seekers' in Ademola Abass and Francesca Ippolito (eds), *Regional Approaches to the Protection of Asylum Seekers: An International Legal Perspective* (Ashgate 2014) 56.

[71] Except the article 13 rights to political participation and access to the public service, which are owed to 'every citizen'.

[72] Bahame Tom Mukirya Nyanduga, 'Refugee Protection Under the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa' (2004) 47 German YB Intl L 85, 101.

[73] Gina Bekker, 'The Protection of Asylum Seekers and Refugees within the African Regional Human Rights System' (2013) 13 Afr Hum Rts LJ 1, 10.

protected by the African Charter means that refugees may invoke Charter protections regarding *non-refoulement* and asylum as such, and regarding their rights during the period of asylum.

(a) Non-refoulement and asylum

International refugee law provides that an individual may not be returned to a state where his or her life or freedom would be threatened for a 1951 Convention reason.[74] African refugee law similarly provides that an individual may not be subjected to measures that would compel him or her to return to, or remain in, a territory where his or her life, physical integrity or liberty would be threatened for a 1969 Convention reason.[75] International human rights law has expanded the scope of *non-refoulement* such that it now also prohibits return to torture, to cruel, inhuman or degrading treatment or punishment and to arbitrary deprivations of life.[76] This human rights form of *non-refoulement* is typically known as 'complementary protection' because it extends, and hence is complementary to, refugee law's *non-refoulement* protection. It is now widely accepted that both the refugee law and the human rights law forms of *non-refoulement* have attained the status of customary international law.[77]

[74] 1951 Convention (n 1) art 33(1).

[75] Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45, art II(3).

[76] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 3(1); ICCPR (n 18) art 7, read with HRC, 'General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (29 March 2004) para 12 (see chapter 3, n 41).

[77] Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-refoulement: Opinion' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003); contra: James C Hathaway, 'Leveraging Asylum' (2009) 45 Texas Intl LJ 503.

Regional human rights law also provides for complementary protection. Article 5 of the African Charter prohibits 'torture, cruel, inhuman or degrading punishment and treatment'. The African Commission has held that return to face such treatment is equally prohibited.[78] Similarly, the Commission, in its 'Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa', instructs states to 'ensure no one is expelled or extradited to a country where he or she is at risk of being subjected to torture'.[79] Thus while *non-refoulement* is not explicitly addressed by the African Charter, the interpretation of the Charter provision on torture and other ill treatment, together with Commission guidance, has given rise to complementary protection in Africa.

Just as article 5 of the Charter supports *non-refoulement*, article 12 contributes to *non-refoulement*'s corollary, asylum. Various aspects of the African Charter's article 12 support asylum. Article 12(3) protects the right to 'seek and obtain' asylum, article 12(4) prohibits the arbitrary expulsion of non-nationals and article 12(5) forbids the mass expulsion of non-nationals. Each relevant part of article 12 is addressed in turn, beginning with article 12(3).

Article 12(3) of the African Charter protects the right of every individual 'when persecuted, to seek and obtain asylum in other countries in accordance with the

[78] *John K Modise v Botswana* comm no 97/93, 10th Annual Activity Report of the Af Cm HPR (2000) para 91; *Institute for Human Rights and Development in Africa v Republic of Angola* comm no 292/2004, 24th Annual Activity Report of the Af Cm HPR (2008) (Institute for Human Rights and Development) para 84; see, also, Chetail (n 6) 35; Rachel Murray, 'Refugees and Internally Displaced Persons and Human Rights: the African System' (2005) 24 RSQ 56, 59.

[79] African Commission, 'Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa' (32nd Ordinary Session, 17–23 October 2002) art 15.

law of those countries and international conventions'. This regional right to seek and *obtain* asylum is broader than the cognate right on the international plane. Article 14 of the UDHR protects only the right 'to seek and to *enjoy* in other countries asylum from persecution'.[80] The UN Declaration on Territorial Asylum is similarly circumscribed.[81] The broader African wording was perhaps inspired by the inter-American provision that preceded it: the American Convention on Human Rights protects the right 'to seek and be *granted* asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offences or related common crimes'.[82] Gittleman maintains that the recognition of the right to asylum in both regional conventions is 'far-reaching in light of the earlier attitude of the international community that individuals had no such right of any legal significance'.[83] Despite this advance, the grant of asylum remains in international law within the exclusive discretion of states.[84] Indeed, 'it has long been recognised that, according to customary international law, the right of asylum is a right of States, not of the individual'.[85] That individuals have no right to be granted asylum is reflected in the language of article 12(3), which features a clawback clause subjecting the right to 'obtain' asylum to the domestic laws of the state where protection is sought. The African Charter has thus advanced—but has not

[80] UNGA, Res 217 A (III) (10 December 1948) (emphasis added); see, generally, Alice Edwards, 'Human Rights, Refugees, and The Right "To Enjoy" Asylum' (2005) 17 IJRL 293.

[81] UNGA, Res 2312 (XXII) (14 December 1967).

[82] Adopted 21 November 1969, entered into force 18 July 1978, 1144 UNTS 123 (emphasis added).

[83] Gittleman (n 40) 698.

[84] Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 358.

[85] *Minister for Immigration and Multicultural Affairs v Khawar* [2002] HCA 14, para 42.

enshrined—the recognition of an individual right to asylum on the international plane.

While article 12(3) represents progressive development towards the international recognition of an individual right to asylum, it could have been broader still. Drafting of the African Charter began in the late 1970s, at which point the 1969 Convention was already in force. The regional refugee instrument protects individuals fleeing 'external aggression, occupation, foreign domination or events seriously disturbing public order',[86] in addition to those in flight from persecution.[87] It is curious, therefore, that the African Charter right to seek and obtain asylum is limited to individuals who have been persecuted. The African Commission had occasion to interpret article 12(3) in line with the 1969 Convention in *Organisational mondiale contre la torture v Rwanda* (*OMT*), a case about the expulsion of four Burundian refugees from Rwanda on ostensible security grounds. The Commission, however, missed the opportunity, merely holding that article 12(3) provides 'a general protection of all those who are subject to *persecution*, that they may seek refuge in another state'.[88] Article 12(3) is also unduly narrow in that the right to seek and obtain asylum applies only 'when persecuted', which Naldi and d'Orsi argue is susceptible to a restrictive interpretation pursuant to which 'refugees are required to have suffered actual persecution rather than simply demonstrating the more generous [international] standard of a well-founded fear of persecution'.[89] Again, *OMT*

[86] 1969 Convention (n 75) art I(2).

[87] ibid art I(1).

[88] *Organisation mondiale contre la torture and Others v Rwanda* comm nos 27/89, 46/91, 49/91, 99/93, 10th Annual Activity Report of the Af Cm HPR (1996) (OMT) para 31 (emphasis added).

[89] Naldi and D'Orsi (n 70) 62.

presented the African Commission with the opportunity to broaden the scope of article 12(3), but instead the Commission remained true to the letter of the Charter, interpreting the provision as providing 'a general protection of all those *who are subject to* persecution'.[90]

While the Commission has interpreted article 12(3) narrowly, scholars have been more creative. Beyani has interpreted the right to seek and obtain asylum in light of the African Charter's article 7(1) on due process and fair trial rights. Applying the constitutive theory of interpretation, pursuant to which a treaty is interpreted as an integral whole, he argues that the language of article 7(1) and the Commission's approach to it imply that states parties have an obligation to establish institutions and fair procedures for RSD, which would include legal assistance.[91] This position received a measure of support when article 7(1) was applied in a refugee context. In *OMT*, the Commission held that Rwanda's expulsion of four Burundian refugees violated the refugees' article 7(1) due process rights.[92]

Articles 12(4) and 12(5) are the source of an emerging line of Commission jurisprudence relating to the expulsion of refugees, and migrants more generally. Article 12(4) prohibits the arbitrary expulsion of non-citizens, providing that a 'non-national legally admitted in a territory of a State Party … may only be expelled from it by virtue of a decision taken in accordance with the law'. The above-mentioned

[90] OMT (n 88) para 31 (emphasis added).

[91] Chaloka Beyani, *Protection of the Right to Seek and Obtain Asylum Under the African Human Rights System* (Martinus Nijhoff 2013) 52–3. Note, however, that the European Convention on Human Rights' fair trial guarantee was found not to apply to asylum proceedings (*Katani v Germany* app no 67679/01 (ECtHR 31 May 2001)).

[92] OMT (n 88) para 34.

expulsion of four Burundian refugees from Rwanda was found to violate article 12(4).[93] The provision was also applied in favour of refugees in *African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v Guinea* (*African Institute*),[94] which dealt with allegations that the Guinean President incited discrimination against Sierra Leonean refugees in a speech urging their arrest and confinement to camps. As a result, thousands of Sierra Leonean refugees fled their homes in Guinea and many had no choice but to return to Sierra Leone, while others were forced back there by the Guinean authorities.

Article 12(5) of the Charter also prohibits the expulsion of non-nationals but relates in particular to mass expulsion, which is characterised as discriminatory expulsion 'aimed at national, racial, ethnic or religious groups'. Demonstrating a qualitative, as opposed to quantitative, approach to mass expulsion, article 12(5) was found to have been violated in *OMT*, which related to only four refugees.[95] It was similarly violated in *Institute for Human Rights and Development in Africa v Republic of Angola* (*Institute for Human Rights and Development*), which concerned 14 Gambians who had been living and working legally in Angola and were deported as part of the government's *Operaçao Brilhante*.[96] *Institute for Human Rights and Development* also demonstrated the Commission's willingness to apply article 12(5) to groups not specifically mentioned in the provision. The Commission found article 12(5) to have been violated on the basis of the Gambians' status as non-nationals

[93] ibid para 30.

[94] African Institute (n 69).

[95] OMT (n 88) paras 31–2.

[96] Institute for Human Rights and Development (n 78).

from West and Central African countries,[97] paving 'the way for the possibility of categories not specifically mentioned in article 12(5) … being afforded protection in terms of this provision'.[98]

Violations of article 12(5) have also been found in larger-scale expulsions. In *Union interafricaine des droits de l'homme v Angola* (*Union interafricaine des droits de l'homme*), the mass expulsion of West Africans from Angola violated article 12(5).[99] In *Rencontre Africaine pour la defense des droits de l'homme (RADDHO) v Zambia* (*RADDHO*), the detention and subsequent deportation of 517 West Africans from Zambia contravened the prohibition of mass expulsion.[100] These cases also illustrate that the expulsion need not have occurred at one point in time to violate article 12(5);[101] in each of *Institute for Human Rights and Development*, *Union interafricaine des droits de l'homme* and *RADDHO*, a number of separate deportations occurred over a period of several months. According to Bekker, the latter two cases also evidence the Commission's view that mass expulsion constitutes a gateway human rights violation. She argues that implicit in *Union interafricaine des droits de l'homme* and *RADDHO* is 'acknowledgement that the prohibition against mass expulsions is a right upon which a number of other rights are predicated'.[102] Indeed, in an earlier communication the Commission had noted that mass expulsion

[97] ibid para 69.

[98] Gina Bekker, 'Mass Expulsion of Foriegn Nationals: A 'Special Violation of Human Rights' - Communication 292/2004 Institute for Human Rights and Development in Africa v Republic of Angola' (2009) 9 Afr Hum Rts LJ 262, 270.

[99] Comm no 292/04, 23rd and 24th Annual Activity Report of the Af Cm HPR (2004).

[100] RADDHO (n 68) paras 19–28.

[101] Bekker (n 98) 270.

[102] ibid 264.

'calls into question a whole series of rights recognized and guaranteed by the Charter'.[103]

The article 12 prohibitions on expulsion clearly support asylum when they are invoked in favour of refugees. In view of *Institute for Human Rights and Development*, they now also contribute to *non-refoulement*. In that case, the Commission explained that 'a state's right to expel individuals is not absolute and it is subject to certain restraints'.[104] According to the Commission, procedural safeguards must ensure that non-nationals 'are not sent back/deported/expelled to countries or places they are likely to suffer from torture, inhuman or degrading treatment, or death, among others'.[105] Thus while article 5 of the Charter has been interpreted to prohibit return to torture or other ill-treatment, article 12 requires procedural safeguards to prevent the same. The overall contribution of article 12 to *non-refoulement* may have been implicitly acknowledged by the African Commission in *Curtis Francis Doebbler v Sudan*, which concerned the repatriation of Ethiopian refugees by virtue of Sudan's 1999 invocation of the 1951 Convention's article 1C(5) cessation clause.[106] The Commission held that the *refoulement* of the refugees to Ethiopia where they feared persecution would constitute a violation of the Charter.[107] The Commission did not articulate the provision it was relying upon, however it is

[103] *Union inter-Africaine des droits de l'homme, Federation internationale des ligues des droits de l'homme, Rencontre Africaine des droits de l'homme, Organisation nationale des droits de l'homme au Senegal and Association Malienne des droits de l'homme v Angola* comm no 159/96, 11th Annual Activity Report of the Af Cm HPR (1997) para 17.

[104] Institute for Human Rights and Development (n 78) para 79.

[105] ibid para 84.

[106] *Curtis Francis Doebbler v Sudan* comm no 235/00, 27th Annual Activity Report of the Af Cm HPR (2009) (Doebbler).

[107] ibid para 146.

likely the members had article 12 in mind, because article 5 relates to *non-refoulement* to torture and cruel, inhuman or degrading punishment and treatment, rather than to persecution.

(b) Rights in the country of asylum

With the exception of the African Charter's article 13 guarantees of political participation, refugees benefit from all Charter rights during the period of displacement, as discussed above. As a result of their unique circumstances, certain rights are, however, of particular relevance to refugees during exile. Among these, the guarantee of non-discrimination is of paramount importance. According to Hathaway, 'to the extent that the main concern of refugees is to be accepted by a host community, a guarantee of non-discrimination might in fact be virtually the only legal guarantee that many refugees require'.[108] The African Charter includes an accessory protection from discrimination at article 2, which provides that

> [e]very individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.

This provision was applied in *African Institute* in the context of the mass expulsion of Sierra Leonean refugees from Guinea,[109] as well as in the context of the expulsion of four Burundian refugees from Rwanda.[110]

[108] Hathaway (n 2) 123.

[109] African Institute (n 69) para 69.

[110] OMT (n 88) para 32.

The African Charter also includes a free-standing right to equality, at article 3. It guarantees that every individual shall be 'equal before the law' and 'entitled to equal protection of the law'. Like the corresponding right on the international plane—article 26 of the ICCPR—this ensures formal equality (equality before the law) as well as substantive equality (equal protection of the law) in respect of rights not articulated by the Charter itself. Moreover, the Charter goes beyond the ICCPR in that its prohibition of discrimination is not limited to enumerated grounds. Hathaway has noted that ICCPR article 26 might 'be a sufficient basis to require asylum states to bring an end to any laws or practices that set refugees apart from the rest of their community'.[111] If this is true of the ICCPR, it must be equally true of the African Charter, especially because the article 3 protection is not limited to specific grounds of discrimination. This has, however, been surprisingly overlooked by the African Commission in its decisions and by scholarly accounts of refugee protection under African human rights law.

In addition to non-discrimination, civil and political rights are of particular relevance to refugees. Although 'no combined study on the conditions faced by refugees … in Africa exists',[112] there is ample evidence that refugees in Africa regularly experience violations of their most fundamental human rights.[113] According

[111] Hathaway (n 2) 127–8; see, also, Sharpe (n 20).

[112] Zachary A Lomo, 'The Struggle for the Protection of the Rights of Refugees and IDPs in Africa: Making the Existing International Legal Regime Work' (2000) 18 Berk J Intl L 268, 272.

[113] See Edwin Odihambo Abuya, 'From Here to Where? Refugees Living in Protracted Situations in Africa' in Alice Edwards and Carla Ferstman (eds), *Human Security and Non-Citizens: Law, Policy and International Affairs* (CUP 2010); Jeff Crisp, 'Africa's Refugees: Patterns, Problems and Policy Challenges' (2000) 8 Afr YB Intl L 93; Lomo (n 112) 272–5; Bonaventure Rutinwa, 'The End of Asylum? The Changing Nature of Refugee Policies in Africa' (2002) 21 RSQ 12; Guglielmo Verdirame and Barbara Harrell-Bond, *Rights in Exile: Janus Faced Humanitarianism* (Berghahn Books 2005).

to Lomo, the 'greatest danger to refugees … in Africa has been the threat of violence to their persons',[114] jeopardising their article 4 rights to life and personal integrity. Verdirame and Harrell-Bond catalogue instances of torture and cruel, inhuman or degrading punishment or treatment experienced by refugees in Kenya and Uganda.[115] Refugees in Africa are also often confined to camps,[116] in violation of their article 12(1) right to freedom of movement.[117] 'First generation' Charter rights are thus particularly salient for refugees in Africa. Indeed, Commission communications concerning violations of refugees' rights during asylum generally relate to civil and political rights, including the article 4 right to life,[118] the article 5 prohibition of torture, cruel, inhuman or degrading punishment and treatment,[119] the article 6 right to liberty and security of the person,[120] the article 7 right to a fair trial[121] and the article 14 right to property.[122] The violation of refugees' article 12(1) right to freedom of movement and residence has never been litigated before the African Commission, despite the widespread use of refugee camps in Africa.

[114] Lomo (n 112) 277.

[115] Verdirame and Harrell-Bond (n 113) 133–51.

[116] Lomo (n 114) 281–3.

[117] Marina Sharpe and Salima Namusobya, 'Refugee Status Determination and the Rights of Recognized Refugees under Uganda's Refugees Act 2006' (2012) 24 IJRL 561, 572–5.

[118] African Institute (n 69); OMT (n 88); Doebbler (n 106), however the Commission found no violation of article 4.

[119] African Institute (n 69); OMT (n 88); Doebbler (n 106), however the Commission found no violation of article 5.

[120] OMT (n 88); Doebbler (n 106), however the Commission found no violation of article 6.

[121] OMT (n 88).

[122] African Institute (n 69).

3. Other core human rights instruments

In 2003 the African Charter was supplemented by a protocol on the rights of women in Africa. The Women's Protocol protects refugee women in a general sense and also contains several provisions devoted to refugees. Article 4 on the right to life, integrity and security of the person commits states parties to ensuring that

> women and men enjoy equal rights in terms of access to refugee status determination procedures and that women refugees are accorded the full protection and benefits guaranteed under international refugee law, including their own identity and other documents.[123]

Article 10 on the right to peace further commits states parties to ensuring the increased participation of women 'in the local, national, regional, continental and international decision making structures to ensure physical, psychological, social and legal protection of asylum seekers, refugees, returnees and displaced persons, in particular women' [124] and 'in all levels of the structures established for the management of camps and settlements for asylum seekers, refugees, returnees and displaced persons, in particular, women'.[125] Finally, with article 11 on the protection of women in armed conflict states parties undertake

> to protect asylum seeking women, refugees, returnees and internally displaced persons, against all forms of violence, rape and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide and/or crimes against humanity and that their perpetrators are brought to justice before a competent criminal jurisdiction.[126]

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[123] Women's Protocol (n 32) art 4(2)(k).

[124] ibid art 10(2)(c).

[125] ibid art 10(2)(d).

[126] ibid art 11(3).

As a Protocol to the African Charter, the Women's Protocol is supervised by the African Commission, rather than by its own treaty monitoring body. The Commission has yet to apply the Women's Protocol in a refugee context.

The Children's Charter was adopted in 1990. It has a dedicated treaty monitoring body, the African Committee of Experts on the Rights and Welfare of the Child. Like the African Charter, the Children's Charter is relevant to refugee minors in a general sense, and it also contains a refugee-specific provision,[127] which is very similar to the Convention on the Rights of the Child's article 22.[128] Article 23 of the Children's Charter provides in part:

> 1. States Parties to the present Charter shall take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether unaccompanied or accompanied by parents, legal guardians or close relatives, receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the States are Parties.
> 2. States Parties shall undertake to cooperate with existing international organizations which protect and assist refugees in their efforts to protect and assist such a child and to trace the parents or other close relatives of an unaccompanied refugee child in order to obtain information necessary for reunification with the family.
> 3. Where no parents, legal guardians or close relatives can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his family environment for any reason.

The Committee of Experts on the Rights and Welfare of the Child engages primarily in promotional activities and has only issued one decision, which does not relate to refugees.

[127] See, generally, Thoko Kaime, 'From Lofty Jargon to Durable Solutions: Unaccompanied Refugee Children and the African Charter on the Rights and Welfare of the Child' (2004) 16 IJRL 336.

[128] Adopted 20 November 1989, entered into force 2 September 1990, 1577 UNTS 3.

D. THE RELATIONSHIP BETWEEN REGIONAL HUMAN RIGHTS LAW AND THE 1969 CONVENTION

That human rights apply to refugees is settled law and, as discussed above, in recent years scholars have elaborated the role of human rights in refugee protection on both the international[129] and regional planes.[130] Yet the precise relationships between human rights and refugee law, and particularly relationships of conflict, remain virtually unexamined. For example, Naldi and D'Orsi note only that international refugee law has had to adapt to comply with international human rights law's often superior norms,[131] without explaining how refugee law has adapted, or what 'adaptation' even means in this context. Similarly, Murray's treatment of the 'relationship between human rights and refugee law' is limited to a brief description of how the African Commission and the AU have engaged with refugee protection.[132] An expert meeting on 'Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law' tackled these relationships thematically, and did not address specific norm conflicts, beyond implying that these should be addressed in accordance with the ILC approach.[133]

[129] See section B above.

[130] See, for example, Bekker (n 73), Beyani (n 91), Naldi and D'Orsi (n 70), Rachel Murray, *Human Rights in Africa: From the OAU to the African Union* (CUP 2004) chap 7.

[131] Naldi and D'Orsi (n 70) 56.

[132] Murray (n 130) 185–6.

[133] UNHCR, 'Expert Meeting on Complementarities between International Refugee law, International Criminal Law and International Human Rights Law, Arusha, Tanzania, 11-13 April 2011' (2011) 23 IJRL 860, para 4.

The dearth of specific relationship analysis is particularly surprising given recent academic[134] and practical[135] interest in the relationships between discrete areas of international law in general, and in the relationships between specific bodies of international law, such as human rights and humanitarian law,[136] in particular. International refugee law has not been exempted from this line of enquiry, but it has largely examined the regime's relationships with international humanitarian law, international human rights law and international criminal law in a general[137] or thematic[138] sense; specific relationships between refugee law on the one hand and human rights law on the other, and relationships of conflict in particular, have gone largely unexplored on both the international and regional planes.[139]

This lack of analysis is perhaps due to the fact that international norms of refugee and human rights law generally do not conflict.[140] International human rights

[134] See, for example, Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 Mich J Intl L 999; Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law: Postmodern Anxieties?' (2002) 15 Leiden J of Intl L 553.

[135] International Law Commission, 'Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law - Report of the Study Group of the International Law Commission' (13 April 2006) A/CN4/L682 (Fragmentation Report).

[136] See, for example, Marko Milanovic, 'Norm Conflicts, International Humanitarian Law and Human Rights Law' in Orna Ben-Naftali (ed), *Human Rights and International Humanitarian Law, Collected Courses of the Academy of European Law*, vol XIX/1 (OUP 2010).

[137] See, for example, David James Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill 2014); Violeta Moreno-Lax, 'Systematising Systemic Integration: 'War Refugees', Regime Relations, and a Proposal for a Cumulative Approach to International Commitments' (2014) 12 J Intl Crim Justice 907.

[138] See, for example, Idil Atak and James Simeon, 'Human Trafficking: Mapping the Legal Boundaries of International Refugee Law and Criminal Justice' (2014) 12 J Intl Crim Justice 1019; Valerie Oosterveld, 'Gender at the Intersection of International Refugee Law and International Criminal Law' (2014) 12 J Intl Crim Justice 953.

[139] Chetail (n 6) is a notable exception. His piece examines specific relationships of interpretation, but not specific relationships of conflict, as these do not arise on the international plane.

[140] Chetail (n 6) 22.

law in most cases provides more robust protection than international refugee law, and the 1951 Convention makes plain that such higher standards should apply alongside it.[141] Hathaway explains that article 5 of the 1951 Convention

> should be read as requiring governments to respect the array of important international human rights accords negotiated in recent years. These international human rights conventions generally regulate the treatment of all persons subject to a state's jurisdiction, and are therefore critical sources of enhanced protection for refugees. Art. 5 of the Refugee Convention makes clear that the drafters were aware that refugees would be protected by additional rights acquired under the terms of other international agreements, and that they specifically intended that this should be so.[142]

However, this apparently straightforward parallelism between the 1951 Convention and international human rights law's higher standards of treatment obfuscates several important relationship issues on the regional plane. The simultaneous applicability of the 1969 Convention and the African Charter to refugees in Africa raises two relationships of interpretation and two relationships of conflict. The relationships of interpretation relate to the 1969 Convention's and the African Charter's respective provisions on asylum,[143] and to the 1969 Convention's voluntary repatriation provision[144] and the Charter right to leave and return.[145] There are relationships of conflict between the 1969 Convention's prohibition of subversive activities[146] and the African Charter's freedoms of expression[147] and association,[148] and between the 1969

[141] 1951 Convention (n 1) art 5, which provides: '[n]othing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention'.

[142] Hathaway (n 2) 110.

[143] 1969 Convention (n 74) art II(1) and African Charter (n 3) art 12(3).

[144] 1969 Convention (n 74) art V(1).

[145] African Charter (n 3) art 12(2).

[146] 1969 Convention (n 74) art III.

[147] African Charter (n 3) art 9(2).

[148] ibid art 10(1).

Convention's provision on settlement[149] and the Charter's freedom of movement guarantee.[150] These are analysed or resolved here in line with the ILC approach. This approach was detailed in the introductory chapter. It essentially views articulating the relationship between legal instruments as a contextual process of treaty interpretation, supplemented by relevant interpretive maxims when treaty interpretation does not yield a harmonising interpretation.

The propriety of the ILC approach in this context is confirmed by a rare reference to specific norm conflicts between refugee law on the one hand and human rights law on the other, made by the African Commission in *Curtis Francis Doebbler v Sudan*. The complainant raised the issue, as recounted in the decision:

> [t]he Complainant argues that since the African Charter is a treaty that is *later in time*, than either the UN Refugees Convention, or the African refugees convention, the general principle of international law to be applied to resolve any conflict between treaties is that the latter treaty prevails over the former treaty that are [*sic*] not compatible. The Complainant relies on Article 30(3) of the Vienna Convention on the Law of Treaties, which states that 'the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.' He argues that by applying this principle, any provisions of the UN refugees convention that are incompatible with either the African refugee convention or the Charter must be deemed to be overridden by these latter two instruments.[151]

The Commission, however, rejected the complainant's reliance on *lex posterior*—which does not usually apply unless the parties to the treaties under consideration are the same[152]—in favour of the ILC-sanctioned approach, which

[149] 1969 Convention (n 74) art II(6).

[150] African Charter (n 3) art 12(1).

[151] Doebbler (n 106) para 124.

[152] International Law Commission, 'Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (2006) 2 UNYBILC 175 (ILC) para 25.

prioritises a harmonising interpretation. Though it did not mention the ILC approach specifically, the African Commission's strong presumption against normative conflict suggests ILC influence:

> [t]he Commission wishes to state that it does not find any conflict or incompatibility between the African Charter and the two refugees' convention [*sic*], or between the UN and the OAU refugees conventions. The 1969 OAU Convention stipulates that it is a complement to the 1951 UN Refugees Convention. Paragraph 9 of its preamble recognises the 1951 UN Convention and the 1967 Protocol as the basic and universal instruments relating to the status of refugees. Article VIII of the OAU Convention enjoins Member States to cooperate with the UNHCR, and states further that the OAU Convention is a regional complement to the 1951 UN Convention. In that respect the Commission shall read the provisions of the three instruments as complementing each other. The Complainant's argument that the provisions of the latter convention prevail over the former do not in any way affect the interpretation the Commission will give to the applicable provisions, should it be necessary to do so under this communication. This is because the provisions are at most complementary to each other and not mutually exclusive.[153]

Following this lead, the ILC approach is applied here, in the first instance to relationships of interpretation, which—as a reminder—are those in which 'one norm assists in the interpretation of another'.[154]

1. Relationships of interpretation

(a) Asylum under the African Charter and the 1969 Convention

The 1969 Convention and African Charter provisions on asylum were discussed in chapter 3 and above. The latter instrument gives every individual 'the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of

[153] Doebbler (n 106) paras 125–6.

[154] ILC (n 152) para 2.

those countries and international conventions'.[155] The former exhorts member states to 'use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality'.[156]

The reference to international conventions in the African Charter's provision on asylum makes plain that it must be interpreted in light of international law, including the 1969 Convention. States' obligation under the 1969 Convention is one of means, not of result. Thus when analysed together, the outcome is the same as when each instrument is interpreted in isolation: there is no individual right to asylum in Africa, however states must do their utmost to provide asylum. Moreover, interpreting the African Charter in light of the 1969 Convention goes some way to remedying the issue identified above: that the African Charter seems to limit the right of asylum to individuals who have been 'persecuted'. Under the 1969 Convention, states must 'use their best endeavours' to grant asylum to all refugees 'who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality'.[157] Such 'well-founded reasons' presumably include both individuals who have fled persecution as well as those who left due to 'external aggression, occupation, foreign domination or events seriously disturbing public order'.[158]

[155] African Charter (n 3) art 12(3).

[156] 1969 Convention (n 74) art II(1).

[157] ibid.

[158] ibid art I(2).

(b) The right to return and voluntary repatriation

Article 12(2) of the African Charter gives every individual the 'right to leave any country including his own, and to return to his country'. The 1969 Convention speaks of return in the refugee context, providing that the 'essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will'.[159] It then goes on to provide for the modalities of such voluntary repatriation.[160] Extrapolating from *John D Ouko v Kenya* (*Ouko*),[161] Beyani insists on the importance of interpreting article 12(2) of the African Charter in light of the 1969 Convention's provisions on voluntary repatriation.

In *Ouko*, the African Commission found that the persecution the claimant experienced in Kenya and during his subsequent flight to Uganda violated his Charter rights to leave and to return, among others.[162] The Commission also urged Kenya to facilitate Ouko's safe return.[163] According to Beyani, such return cannot be understood in isolation; rather, it must be viewed in light of the 1969 Convention's article V on voluntary repatriation. Beyani explains that voluntary repatriation is normally implemented though tripartite agreements between the country of origin, the host state and UNHCR. He argues that further to *Ouko*, 'repatriation agreements which do not satisfy the conditions stipulated in' article V of the 1969 Convention

[159] ibid art V(1).

[160] ibid arts V(2)–(5).

[161] *John D Ouko v Kenya* comm no 232/99, 14th Annual Activity Report of the Af Cm HPR (2000).

[162] ibid, para 31.

[163] ibid; Beyani misstates the Commission's holding, recounting that the Commission 'further determined that the State of origin has a duty to facilitate safe return' (Beyani (n 91) 43), while in fact, the Commission only 'urged' Kenya to facilitate the claimant's return.

may 'be challenged as a breach of the duty to ensure safe return under Article 12 of the African Charter'.[164] Chetail has made the same argument in the international context. Further to the Human Rights Committee view that 'the right of a person to enter his or her own country … includes … the right to return after having left one's own country' which 'is of the utmost importance for refugees seeking voluntary repatriation',[165] Chetail argues that the right 'to return proves to be crucial for ensuring both the voluntary nature of repatriation and the correlative obligation of states of origin to admit their nationals'.[166]

2. Relationships of conflict

(a) Political rights and the 1969 Convention prohibition of subversive activities

Hathaway explains that the 1969 Convention purports 'to deny some forms of political free speech as the cost of enhanced basic protection rights'.[167] He is referring to the 1969 Convention's article III, titled the 'Prohibition of Subversive Activities'.[168] In its first paragraph, it exhorts every refugee to 'abstain from any subversive activities against any Member State of the OAU' and goes on in paragraph 2 to call on signatory states to 'prohibit refugees residing in their respective territories

[164] Beyani (n 91) 43. See, however, note 163 above; Beyani's characterisation of the African Commission's holding as a 'duty', when in fact the Commission merely 'urged' Kenya to facilitate Ouko's return to Kenya, might mean that his argument is slightly overstated.

[165] HRC, 'General Comment No 27: Freedom of Movement' (2 November 1999) para 19, cited in Chetail (n 6) 47.

[166] Chetail (n 6) 47.

[167] Hathaway (n 2) 119.

[168] See, generally, Steven Corliss, 'Asylum State Responsibility for the Hostile Acts of Foreign Exiles' (1990) 2 IJRL 181.

from attacking any State Member of the OAU, by any activity likely to cause tension between Member States, and in particular by use of arms, through the press, or by radio'. As discussed in chapter 2, the prohibition of subversive activities was the result of member state concern that exiled freedom fighters operating on their territories would undermine international relations.[169]

The prohibition of subversive activities regularly plays out in practice, though restrictions are not necessarily explicitly linked to article III. For example, in a communication the African Commission ultimately deemed inadmissible, Mauritanian refugees complained that their freedoms of expression and assembly had been violated when the town of Podor in Senegal banned their planned demonstration.[170] Refugees have been expelled from Zimbabwe for merely criticising the government, and Tanzania prohibits meetings of more than five refugees.[171] According to Mandal, 'there is evidence that some OAU States have adopted a rather sweeping approach to Article III, interpreting it as prohibiting any political activity with respect to the refugee's country of origin, or indeed any political activity whatsoever'.[172]

It must be determined whether the prohibition of subversive activities conflicts with the African Charter guarantees of expression, association and assembly. Each of these features a clawback clause. Every individual has the right to 'express and

[169] See chapter 2, section D.

[170] *Mouvement des réfugiés mauritaniens au Sénégal pour la defense des droits de l'homme v Senegal* comm no 254/02, 16th Annual Activity Report of the Af Cm HPR (2003).

[171] Ruma Mandal, 'Political Rights of Refugees' (2003) UNHCR Legal and Protection Policy Research Series <http://www.refworld.org/pdfid/3fe820794.pdf> accessed 12 January 2015, 20–1.

[172] ibid 2.

disseminate his opinions *within the law*',[173] to 'free association *provided that he abides by the law*'[174] and to 'assemble freely with others' subject to 'necessary restrictions provided for by law, in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others'.[175] These restrictions on the freedoms of expression, association and assembly make the rights in question contingent upon domestic laws. However, as explained above, the African Commission interprets clawback clauses as limiting rights only insofar as the relevant domestic law complies with international human rights standards,[176] and these international standards protect expression, association and assembly robustly. The ICCPR protects expression subject only to such restrictions as are necessary to protect the 'rights or reputations of others' and for 'the protection of national security or of public order (*ordre public*), or of public health or morals'.[177] Similarly, the rights of association and peaceful assembly may only be limited insofar as is 'necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others'.[178]

Also relevant to the analysis is article 23(2) of the African Charter, which provides,

[173] African Charter (n 3) art 9(2) (emphasis added).

[174] ibid art 10(1) (emphasis added).

[175] ibid art 11.

[176] Media Rights Agenda (n 56) para 66.

[177] ICCPR (n 18) art 19.

[178] ibid arts 21–2.

> [f]or the purpose of strengthening peace, solidarity and friendly relations, State Parties to the present Charter shall ensure that: (a) any individual enjoying the right of asylum under Article 12 … shall not engage in subversive activities against his country of origin or any other State Party to the present Charter; (b) their territories shall not be used as bases for subversive or terrorist activities against the people of any other State Party to the present Charter.[179]

The African Commission has never engaged substantively with this provision,[180] so the meaning of 'subversive activities' is as unclear in the Charter as it is under the 1969 Convention. What is clear is that the article 23(2) prohibition of subversive activities 'has to be compatible with the lawful restrictions provided in the other relevant provisions (Arts. 8 to 11 of the African Charter)',[181] and as explained above, such lawful restrictions flow from the ICCPR.[182]

The question thus becomes whether the 1969 Convention's prohibition of subversive activities can be reconciled with the permissible limitations on the Charter freedoms of expression, association and assembly, where the allowable limitations are those in the ICCPR. It is difficult to answer this question with any certainty, because the precise meanings of 'subversive activities' and 'any activity likely to cause tension between Member States' have never been clarified by a court. It is likely, however, that article III of the 1969 Convention purports to restrict refugees' political rights beyond the ICCPR limitations on expression, association and assembly. The prohibition of subversive activities begins by noting that every refugee 'has duties to the country in which he finds himself, which require in particular that the conforms

[179] African Charter (n 3) art 23(2).

[180] Bekker (n 73) 17.

[181] Chetail (n 6) n 143.

[182] Moreover, article 23(2) is open to challenge as it purports to limit rights on the basis of refugee status, which is arguably prohibited by the Charter's article 2 accessory non-discrimination provision.

with its laws and regulations as well as with measures taken for the maintenance of public order'. That article III mentions public order and then goes on to explicitly prohibit 'subversive activities' and 'any activity likely to cause tension between Member States' suggests that the drafters intended that article III should prohibit political activities lesser than those that rise to the level of threatening public order.

There is some commentary on the relationship between the 1969 Convention's prohibition of subversive activities and political rights under the African Charter. Writing before *Media Rights Agenda* clarified how the Charter's imprecise clawback clauses should be understood, the Lawyers Committee for Human Rights found that article III of the 1969 Convention did not impugn the Charter guarantees of expression and association,[183] because these may be limited 'within the law'. The Lawyers Committee did, however, find the prohibition of subversive activities in clear violation of the ICCPR guarantees of expression and association.[184] Hathaway concluded the same, finding that the 1969 Convention's 'sweeping prohibition on political activities cannot be reconciled to duties under the Covenant on Civil and Political Rights'.[185] The *Media Rights Agenda* approach to clawback clauses—which requires that any limitations on the Charter guarantees of expression and association comply with the limitations permissible under the ICCPR—suggests that today, the African Charter is similarly violated.

[183] The Lawyers Committee did not consider that the prohibition of subversive activities might also impugn freedom of assembly.

[184] Lawyers Committee for Human Rights, *African Exodus: Refugee Crisis, Human Rights and the 1969 OAU Convention* (Lawyers Committee for Human Rights 1995) 93.

[185] Hathaway (n 2) 119 n 177.

The conclusion reached by the Lawyers Committee and by Hathaway, however, ignores the ILC exhortation to seek a harmonising interpretation, which came after the Lawyers Committee and Hathaway works were published. Such a harmonising interpretation can be achieved by construing the 1969 Convention and Charter subversion prohibitions narrowly, such that they would not catch the vast majority of refugees' political activity, thereby limiting genuine norm conflicts to the rare instances in which refugee political activity is truly 'subversive'. Indeed, this is Chetail's approach to the issue. In a footnote, he argues that 'as any exception to a right (ie, freedoms of expression, of association and of peaceful assembly), the very notion of "subversive activities" must be interpreted restrictively and must not impair the essence of the rights in question'.[186] This was also the result reached in a South African analysis of the issue.[187]

Such a narrow construction of the 1969 Convention and Charter subversion prohibitions also finds support in the principle of systemic integration,[188] pursuant to which 'international obligations are interpreted by reference to their normative environment'.[189] This environment includes norms such as the African Commission's Principles on Freedom of Expression in Africa. The Principles affirm freedom of expression as 'a fundamental and inalienable human right and an indispensable

[186] Chetail (n 6) n 143.

[187] Alison Vadachalam, 'Does the 1969 OAU Convention Governight the Specific Aspects of Refugee Problems in Africa Article III Provision Prohibiting "Subversive Activities" Unjustifiably Limit the Freedom of Expression of a Refugee?: A South African Answer' (2014) University of Cape Town Refugee Rights Unit Working Paper No 1 <http://www.refugeerights.uct.ac.za/usr/refugee/Working_papers/Working_Paper_1_of_2014.pdf> accessed 12 January 2015.

[188] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31(3)(c).

[189] Fragmentation Report (n 135) para 413.

component of democracy'[190] and provide that any restrictions on freedom of expression must 'serve a legitimate interest and be necessary in a democratic society'.[191]

In instances in which truly 'subversive' political activity creates genuine norm conflicts, these must be resolved by way of *lex specialis* or *lex posterior*. These maxims cannot, however, be applied mechanically. According to the ILC, whether 'a rule's speciality or generality should be decisive, or whether priority should be given to the earlier or to the later rule' depends on factors such as 'the will of the parties, the nature of the instruments and their object and purpose as well as what would be a reasonable way to apply them with minimal disturbance to the operation of the legal system'.[192] It could be argued that the 1969 Convention is the *lex specialis* regarding refugees' political rights, with the result that article III of the 1969 Convention trumps the African Charter protections of expression, association and assembly. However, such a mechanistic application of *lex specialis* ignores the importance of teleological interpretation in human rights contexts.[193] The teleological approach suggests that *lex posterior* is the appropriate maxim. Pursuant to *lex posterior*, the earlier-in-time article III prohibition of subversive activities must yield to the later-in-time Charter protections of expression, association and assembly. Thus refugees' political activity must be permitted unless it is caught by the ICCPR's limitation clauses. While this approach likely permits more refugee political activity than the

[190] Adopted at the 32nd Ordinary Session (17–23 October 2002) art I(1).

[191] ibid art II(2).

[192] Fragmentation Report (n 135) paras 410–1.

[193] ibid paras 130–1.

drafters of the 1969 Convention intended, it reflects the current normative environment, which is entirely different than that which existed during the years leading up to 1969.

(b) Freedom of movement

Article II(6) of the 1969 Convention provides that 'for reasons of security, countries of asylum shall, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin'. This mention of settlement is at least suggestive of a deprivation of refugees' freedom of movement and residence,[194] and in practice African states regularly confine refugees to camps.[195] Freedom of movement and residence is guaranteed by the African Charter, which provides that 'every individual shall have the right to freedom of movement and residence within the borders of a State *provided he abides by the law*'.[196] This clawback clause has been interpreted by the African Commission in a way that suggests that permissible limitations cannot be based on the violation of an arbitrary or discriminatory law.[197]

A similar apparent conflict, between article II(6) of the 1969 Convention and the 1951 Convention's freedom of movement provision, was addressed in chapter 4, and there a harmonising interpretation was found. The same result applies in this

[194] Beyani (n 91) 43.

[195] Lucy Hovil and Moses C. Okello, 'The Right to Freedom of Movement for Refugees in Uganda' in David Hollenbach (ed), *Refugee Rights: Ethics, Advocacy and Africa* (Georgetown University Press 2008) 78; Sharpe and Namusobya (n 117) 569.

[196] African Charter (n 3) art 12(1) (emphasis added).

[197] *Malawi African Association and Others v Mauritania* comm nos 54/91, 61/91, 98/93, 164/97 to 196/97 and 210/98, 13th Annual Activity Report of the Af Cm HPR (2000) para 126.

context. As discussed in chapter 4, article II(6) does not require states to settle refugees; the provision merely states that if states do so—which presumably would be in extenuating circumstances—it should be at a reasonable distance from the frontier with the country of origin, in order to ensure refugees' safety. The context and object and purpose of the 1969 Convention, and the wider normative environment, affirm this interpretation of settlement as an exceptional measure,[198] as does the Charter's freedom of movement guarantee. When exceptional circumstances warrant refugee settlement—such as when 1.5 million refugees from Rwanda poured into the DRC in 1994—laws, orders or regulations detailing the modalities of this could be promulgated. Provided such laws, orders or regulations were neither arbitrary nor discriminatory and were enacted in light of the exceptional circumstances at hand, refugee settlement would be within the permissible limitations on article 12(1) of the African Charter. Indeed, according to Beyani, restrictions on refugees' freedom of movement are valid as long as they 'achieve the objective of ensuring the safe location of refugees from the boundary of their country of origin'.[199]

E. CONCLUSIONS

This chapter began by tracing the role of human rights law in refugee protection and by situating the current moment as one in which both bodies of law have a role to play. Some scholars disagree about the extent of each body's role, with McAdam coming out on the side of the 1951 Convention,[200] Chetail favouring international

[198] See chapter 4, section D.2.a.

[199] Beyani (n 91) 44.

[200] McAdam (n 12) chap 6.

human rights law[201] and Hathaway sitting somewhere in between.[202] The approach adopted here is the middle and generally accepted one, in which standards of treatment during all phases of displacement derive from both the 1951 Convention, international human rights law and regional human rights law. This chapter has sketched this latter body of law, highlighted the aspects of it that contribute to *non-refoulement*, asylum and rights during displacement and articulated the relationships of interpretation—regarding asylum and regarding the right to return and voluntary repatriation—and of conflict—regarding the prohibition of subversive activities and political rights and regarding freedom of movement—between regional refugee law on the one hand and regional human rights law on the other. Taken together, it is hoped that this chapter has firmly established regional human rights law as contributing to refugee protection in Africa, while also making sense of the legal issues that arise as a result of these two sometimes divergent bodies of law applying to the same refugee population.

However, these issues are largely theoretical, while the 'divergence between the theory and the reality of international human rights law is strikingly apparent',[203] with some scholars questioning whether international human rights law even makes a difference.[204] Such questions are especially salient in Africa, where Viljoen and Luow found a generally modest record of state compliance with African Commission

[201] Chetail (n 6).

[202] Hathaway (n 2) chap 2.

[203] James C Hathaway, 'Reconceiving Refugee Law as Human Rights Protection' (1991) 4 JRS 113, 113.

[204] Oona A Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 Yale Law Journal 1935.

recommendations.[205] This and other implementation issues will be addressed in Part Two.

This marks the end of Part One on the treaty framework for refugee protection in Africa. Part Two is devoted to the institutional architecture supportive of this treaty framework, with chapter 6 focusing on the OAU and the AU, and the final substantive chapter focusing on the roles of African Commission and the African human rights courts in refugee protection.

[205] Frans Viljoen and Lirette Louw, 'State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights 1994-2004' (2007) 101 AJIL 1.

PART TWO: THE INSTITUTIONAL ARCHITECTURE

CHAPTER 6

THE HISTORICAL ROLE OF THE OAU AND THE CONTEMPORARY ROLE OF THE AU IN REFUGEE PROTECTION

A. INTRODUCTION

The 1969 Convention was itself an OAU project, as described in chapter 2. While the Convention's adoption was lauded, the OAU has been criticised for failing to create any self-sustaining institutional implementation mechanism or to empower any one OAU organ with oversight of the 1969 Convention. Indeed, 'if the law relating to refugees is to be effective, it is essential not only that relevant conventions be adopted and ratified, but also that there exist an effective machinery for their implementation'.[1] However, while the OAU did not implement the 1969 Convention in the traditional sense by establishing a treaty body, it did not fail to implement the 1969 Convention altogether. Since its adoption, the 1969 Convention has underpinned all OAU efforts in favour of refugees, reinforcing diplomacy, advocacy and political action.[2] According to Nyanduga, the development of legal instruments such as the 1969 Convention has 'been important in the sustenance of political consciousness about the refugee problem'.[3] In other words, the Convention has been

[1] Medard RK Rwelamira, 'Some Reflections on the OAU Convention on Refugees: Some Pending Issues' (1983) 16 Comp & Intl LJ S Afr 155, 162.

[2] Interview with George Okoth-Obbo, Director, Africa Bureau, UNHCR, 20 June 2011, Geneva.

[3] Bahame Tom Mukirya Nyanduga, 'Refugee Protection Under the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa' (2004) 47 German YB Intl L 85, 102.

implemented in a general sense by the OAU's political organs.[4] These bodies highlighted refugee issues through OAHG and CM resolutions, decisions and declarations;[5] the OAU's Secretary-General regularly reported on refugees to the CM; and the OAU established dedicated refugee protection bodies, organised conferences focused on refugee issues and made special provision for refugees in other legal instruments. Such initiatives are the focus of this chapter.

This critical analysis is important because thus far, evaluations of the extent and efficacy of OAU and AU engagement with refugee protection have seemed to depend on who stands in judgment. Not surprisingly, the impression given by officials is one of a highly engaged and effective organisation:

> [a]s a continental organization, the OAU has been sensitizing its Member States as well as the international community at large to the plight of refugees and displaced persons. The OAU continues to provide education, employment and resettlement opportunities to refugees. In situations of large influxes of refugees, the OAU has made material and financial contributions to Member States confronted with the problem of assisting refugees, returnees and displaced persons upon recommendations by the Commissioners. ... In recent years, the OAU has embarked upon promoting and strengthening the capacity of African non-governmental organizations ... Some of them have received financial assistance from the OAU to enable them to carry out their projects in favour of refugees, returnees and

[4] ibid 96.

[5] The OAHG has issued only a handful of resolutions and decisions relating to refugees: that relating to the drafting of the 1969 Convention, discussed in chapter 2; a 1983 resolution on ICARA II (defined and described below); a 1995 resolution endorsing President Mobutu's proposal to host a World Conference on Refugees and Displaced Persons in what was then Zaire (the conference never eventuated); a 2001 decision marking the fiftieth anniversary of the 1951 Convention; and a decision on the report of the Secretary General on the Situation of Refugees, Returnees and Displaced Persons, adopted at the OAHG's very last session in Durban in 2002. In addition, in 1994 it adopted the Tunis Declaration (OAU (OAHG) 'Tunis Declaration on the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa' (OAU Tunis 1994) AHG/Decl 216). The OCM, by contrast, has adopted many refugee-related resolutions and decisions. Most of these served to take note of reports or establish or direct particular bodies or initiatives, and are cited where relevant throughout this chapter, but several served the more general purpose of, among other things, highlighting refugee protection issues on the continent and/or calling on member states to ratify and implement the 1951 and 1969 conventions.

> displaced persons. ... In the same vein, the OAU has been promoting cooperative partnerships with some sub-regional organizations.[6]

Academics have been less generous in their assessments, seizing in particular on the OAU's failure to work systematically for the implementation of the 1969 Convention. Oloka-Onyango, for example, notes, that 'there is no monitoring mechanism established by [the] OAU (save for the limping Bureau for Refugees), that can effectively pursue the matter of adherence to the principles of the Convention, or indeed monitor the laws and practices of member States in this regard'.[7] Similarly, van Garderen and Ebenstein maintain that

> very little development took place following the adoption of the OAU Refugee Convention. Unlike the 1951 Convention where the UNHCR ExCom has created a body of soft law through regular ExCom Conclusions on a variety of protection-related topics, the OAU/AU failed to further develop and clarify the treaty obligations and standards. The OAU/AU has for a long time failed to devise effective mechanisms to supervise the implementation of the OAU Refugee Convention.[8]

According to Viljoen, the absence of a monitoring body detracted from the 1969 Convention's potential as an agent to change domestic refugee laws and practices.[9]

The divergent views of officials on the one hand and academics on the other is related to the lack of a current and exhaustive account of OAU and AU engagement with refugee protection.[10] The limited evaluations of the refugee work of the

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[6] EM Ngung, 'The Role of Regional and Sub-Regional Organizations in Situations of Conflict and Displacement' (1999) 18 RSQ 97, 99–100; Ngung was the Director of the OAU's Bureau for Refugees, Displaced Persons and Humanitarian Assistance (see section B.1.b).

[7] Joe Oloka-Onyango, 'Human Rights, the OAU Convention and the Refugee Crisis in Africa: Forty Years After Geneva' (1991) 3 IJRL 453, 459.

[8] Jacob van Garderen and Julie Ebenstein, 'Regional Developments: Africa' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (OUP 2011) 203.

[9] Frans Viljoen, *International Human Rights Law in Africa* (2nd edn, OUP 2012) 158.

[10] A brief piece by Ademola Abass and Dominique Mystris ('The African Union Legal Framework for Protecting Asylum Seekers' in Ademola Abass and Francesca Ippolito (eds), *Regional Approaches to the Protection of Asylum Seekers: An International Legal Perspective* (Ashgate 2014)) is a notable

organisation responsible for drafting the 1969 Convention are out of date or focus on only one aspect of engagement.[11] Informed by these and other secondary sources, primary archival and interview research conducted at UNHCR in Geneva in June of 2011 and in Addis Ababa in January of 2012, primary interview research conducted at the AU Commission in Addis Ababa in January of 2012 and primary research using OAU and AU materials—principally decisions, resolutions and declarations of the OAHG and its Council of Ministers and the AU's AHG and its Executive Council—searched up to 1 June 2015,[12] this chapter consolidates knowledge of OAU and AU engagement with refugee protection from the time of the continental organisation's founding in 1963 up to 1 June 2015, though activities related to the drafting of the 1969 Convention are addressed in chapter 2.[13] The section following this introduction relates to OAU engagement with refugee protection subsequent to the adoption of the Convention in 1969, beginning with OAU refugee protection bodies.[14] Each is addressed in turn, beginning with the Commission of Ten (later of Fifteen, then of Twenty and finally of all member states) on Refugee Problems in

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exception, as is an article on which this chapter draws: Marina Sharpe, 'Organization of African Unity and African Union Engagement with Refugee Protection: 1963-2011' (2013) 21 Afr J Intl Comp L 50.

[11] See Philip E Chartrand, 'The Organization of African Unity and African Refugees: A Progress Report' (1975) 137 World Aff 265; Rose D'Sa, 'The African Refugee Problem, Relevant International Conventions and Recent Activities of the Organization of African Unity' (1984) 31 NILR 378; Richard Greenfield, 'The OAU and Africa's Refugees' in Yassin El-Ayouty and I William Zartman (eds), *The OAU After Twenty Years* (Praeger 1984); Rachel Murray, *Human Rights in Africa: From the OAU to the African Union* (CUP 2004) chap 7; Joe Oloka-Onyango, 'The Place and Role of the OAU Bureau for Refugees in the African Refugee Crisis' (1994) 6 IJRL 344.

[12] As of 1 June 2015, the most recent AHG and Executive Council decisions available on the AU's website were from June 2014.

[13] This chapter is concerned with OAU and AU activities. For an analysis of states' evolving policy towards refugees, see Bonaventure Rutinwa, 'The End of Asylum? The Changing Nature of Refugee Policies in Africa' (2002) 21 RSQ 12; Murray (n 11) 201–27. No analysis of state compliance with the 1969 Convention article VII(b) reporting requirement exists, which presents an important avenue for further research.

[14] For an overview of the OAU itself and of the drafting of the 1969 Convention, see chapter 2.

Africa. This is followed by the Bureau for the Placement and Education of African Refugees (BPEAR or the Bureau) and then the Coordinating Committee on Assistance to Refugees (CCAR). Select special refugee protection initiatives, in the form of conferences and summits, are then addressed.

The section that follows relates to the AU, the OAU's successor organisation, beginning with an overview of the AU itself. AU refugee protection bodies are then discussed, starting with the Permanent Representatives Committee's (PRC) Sub-Committee on Refugees, Returnees and Internally Displaced Persons. This is followed by discussions of the Coordinating Committee on Assistance and Protection to Refugees, Returnees and Internally Displaced Persons (CCAPRRI) and the Department of Political Affairs' Division of Humanitarian Affairs, Refugees and Displaced Persons (HARDP). The following sub-section focuses on select special refugee protection initiatives, again in the form of conferences and summits. The final sub-section relates to AU initiatives that are not refugee specific but nevertheless devote some attention to refugees. These are the Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA), the Peace and Security Council (PSC), the Solemn Declaration on a Common African Defence and Security Policy and the African Charter on Democracy, Elections and Governance.

While this chapter is focused on documenting the range of OAU and AU efforts on behalf of refugees, through this legal history there emerges an arc of engagement. When the OAU was formed in 1963 with its agenda of post-colonial state building, refugees were a key issue. Refugee protection remained on the OAU agenda, as reflected by the adoption of the regional refugee convention in 1969 and

the creation of various refugee protection bodies. Yet as the OAU's priorities shifted—evidenced most starkly with the dissolution of the organisation and the formation of the AU—so too did the importance accorded to refugees. The AU was formed largely in light of concerns about conflict and economic growth. Of late, it is primarily focused on security, though it devotes considerable attention to humanitarian issues; refugee protection is slowly being subsumed within these. The final concluding section argues that however refugee protection is framed—whether as part of the AU's more general humanitarian work or otherwise—the organisation must now prioritise the effectiveness of its refugee protection initiatives, a pragmatic focus which has thus far been absent.

B. OAU ENGAGEMENT WITH REFUGEE PROTECTION: 1963 TO 2002

The 1969 Convention clearly contemplates OAU involvement in refugee protection. 'In order to enable the Administrative Secretary-General of the … [OAU] to make reports to the competent organs of the … [OAU]', article VII of the Convention requires that member states 'undertake to provide the Secretariat in the appropriate form with information and statistical data requested concerning: (a) the condition of refugees; (b) the implementation' of the Convention and '(c) laws, regulations and decrees which are, or may hereafter be, in force relating to refugees'. The OAU's engagement with refugee protection began with the formation of several dedicated bodies, which presumably relied to some extent on such state reporting. Each of these bodies is discussed in turn below.

1. OAU refugee protection bodies

(a) The Commission of Ten/Fifteen/Twenty/the Whole on Refugee Problems in Africa

Following the CM's 1964 recommendation that the Commission become a permanent OAU body, discussed in chapter 2, its work focused primarily on drafting the regional instrument. Once the 1969 Convention was adopted, the Commission's work ceased. It was revived at the CM's Nineteenth Ordinary Session, held in Rabat, Morocco, in June 1972, where the Council called on the OAU Secretariat to re-convene the Commission 'to consider the current situation of refugees in Africa and the necessary measures to be taken with a view to their assistance and voluntary repatriation and their resettlement'. [15] The ambassadors duly re-convened in Addis Ababa in December 1972, producing a report that was adopted by the CM at its Twentieth Ordinary Session, held in Addis Ababa in February 1973.[16] It was at this meeting that the Commission was first officially referred to as the Commission of Ten on Refugee Problems in Africa,[17] and thereafter it began to meet annually and submit regular reports to the CM on 'the situation of refugees, returnees and displaced persons in Africa, focusing on the contribution of the Organization in favour of those uprooted'.[18] The Commission thus became the main policy making organ of the OAU on refugee matters.[19] Its activities included undertaking fact-finding missions to

[15] OAU (OCM), 'Resolution on the Bureau for the Placement and Education of African Refugees' (OAU Rabat 5-12 June 1972) CM/Res 266 (XIX) para 1.

[16] OAU (OCM), 'Resolution on the Commission of Ten on Refugees' (OAU Addis Ababa 5-9 February 1973) CM/Res 296 (XX) preambular para 3.

[17] ibid preambular para 2.

[18] Ngung (n 6) 98.

[19] ibid.

states, providing governments with advice and the provision of emergency financial assistance to states in need.[20] It also worked to shape the OAU's response to refugee issues.[21] Okoth-Obbo likens the Commission to UNHCR's ExCom.[22]

In 1980, it was decided that the Commission's membership should rotate and be expanded to include representatives from 15 states.[23] The initial members were Angola, Cameroon, Mali, Niger, Nigeria, Senegal, Sudan, Swaziland, Tanzania, Uganda, Zaire (as it then was), Zambia, Zimbabwe and two further countries, to be selected by North African states.[24] In 1994, the Commission was further expanded to a total membership of 20 states, whose tenure did not rotate.[25] These states were Algeria, Angola, Cameroon, Côte d'Ivoire, Egypt, Gabon, Kenya, Libya, Malawi, Mali, Mozambique, Niger, Nigeria, Senegal, Sudan, Uganda, Tanzania, Zaire, Zambia and Zimbabwe.[26] Soon after its expansion to 20 states, the Commission's workings were formalised through the adoption of Rules of Procedure, which defined the functions of the Commission in almost exactly the same terms as had been used in 1964, when the Commission was first convened as an ad hoc body.[27] In 1998, the

[20] Monette Zard, 'African Union' in Matthew Gibney and Randall Hansen (eds), *Immigration and Asylum From 1900 to the Present* (ABC-CLIO 2005) 7.

[21] ibid.

[22] George Okoth-Obbo, 'The OAU/UNHCR Symposium on Refugees and Forced Population Displacements in Africa-A Review Article' [Special Issue Summer 1995] IJRL 274, 283.

[23] OAU (OCM), 'Resolution on the Situation of Refugees in Africa' (OAU Freetown 18-28 June 1980) CM/Res 814 (XXXV) para 5.

[24] Murray (n 11) 196.

[25] OAU (OCM), 'Resolution on Refugees, Returnees and Displaced Persons in Africa' (OAU Tunis 6-11 June 1994) CM/Res 1521 (LX) para 10.

[26] ibid.

[27] OAU (OCM), 'Rules of Procedure of the OAU Commission of Twenty on Refugees in Africa' (OAU Addis Ababa 23-27 February 1998) in accordance with CM/Res 388 (LXVII).

Commission was again enlarged, this time to include all OAU member states;[28] its Rules of Procedure were revised accordingly.

The Commission played an important role in shaping and communicating the OAU's approach to particular refugee situations.[29] Notably, it adopted the 1990 Khartoum Declaration on Africa's Refugee Crisis, which assessed national, sub-regional, regional and international responses to refugees in Africa and recommended follow-up action to be taken by the OAU and the international community.[30] Yet, despite these achievements, Oloka-Onyango judged the Commission as ineffective:

> [i]n the final analysis … [the Commission] is constrained by its very composition and relationship to the OAU decision-making processes, which are ultimately politically controlled. … Thus the extent of the impact of the … [Commission] is clearly limited by considerations of *Realpolitik*, as well as by the very real constraint of the 'non-interference' clause that still holds considerable sway in Africa despite the recent examples of interventions.[31]

The Commission nevertheless survived the OAU's transformation into the AU,[32] though it was re-named the PRC's Sub-Committee on Refugees, Returnees and Internally Displaced Persons. In this guise, it reports regularly on the situation of refugees, as well as that of returnees and IDPs, in Africa to the AU's Executive Council. The PRC Sub-Committee on Refugees, Returnees and Internally Displaced Persons is discussed further in the AU section below.

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[28] OAU (OCM), 'Decision on the Report of the Commission of Twenty on the Situation of Refugees, Returnees and Displaced Persons in Africa' (OAU Addis Ababa 23-27 February 1998) CM/Res 388 (LXVII) para 13.

[29] Oloka-Onyango (n 11) 39.

[30] OAU (Commission of Fifteen on Refugees), 'Khartoum Declaration on Africa's Refugee Crisis' (OAU Khartoum 22-24 September 1990) OAU Doc BR/COM/XV/5590.

[31] Oloka-Onyango (n 11) 39.

[32] Murray (n 11) 196.

(b) The Bureau for the Placement and Education of African Refugees[33]

The BPEAR was created on 1 March 1968 further to recommendation XI of the 1967 Conference on the Legal, Economic and Social Aspects of African Refugee Problems,[34] which is discussed below, with the task of promoting the resettlement and employment of African refugees and collecting and disseminating information concerning educational, training and employment opportunities for them.[35] The intention was that the Bureau would function as a continental academic and occupational placement system for qualified refugees.[36] Its mandate, however, expanded in practice over time from seeking economic and educational opportunities for refugees to include functioning as an information conduit to member states and the international community on the patterns, causes and consequences of refugee movements in Africa, equipping refugees with resources to assist them in coping with their displacement and eventual repatriation, mediating between host states and refugees regarding alleged violations of national law and working with UNHCR, voluntary agencies and member states to further the objectives of the 1969 Convention.[37]

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[33] For an extensive analysis of the functions of BPEAR and its effectiveness, see Oloka-Onyango (n 11); see, also, Louise W Holborn, *Refugees: A Problem of our Time-The Work of the United Nations High Commissioner for Refugees, 1951-1972*, vol I & II (Scarecrow Press 1974) 942–47; Murray (n 11) 197–200.

[34] Chaloka Beyani, *Protection of the Right to Seek and Obtain Asylum Under the African Human Rights System* (Martinus Nijhoff 2013) 9; Chartrand (n 11) 280.

[35] UNECA and others, 'Final Report of the Conference on the Legal, Economic and Social Aspects of the African Refugee Problems' December 1968 (on file with the author) 115.

[36] Holborn (n 33) 943.

[37] Oloka-Onyango (n 11) 35.

Initially, BPEAR undertook these tasks as an autonomous body. It was entirely independent of the OAU, funded by outside sources (principally UNHCR) and operated through a system of Bureau representatives, known as national correspondents, placed within the executives of OAU member states. A standing committee of UN agencies—namely UNHCR, the International Labour Organization, the ECA, the Educational, Scientific and Cultural Organization and the Development Programme—advised it on operational matters and the Bureau received policy advice from a consultative board composed of the same agencies plus an OAU representative and NGO observers.[38] In 1971, however, BPEAR was placed under the supervision of the OAU's Assistant Secretary-General for Political Affairs.[39] In 1974, the Bureau was further integrated into the OAU Secretariat pursuant to the recommendations of a Commission report, becoming part of the OAU Secretariat's political department both organisationally and financially.[40] The 1974 restructuring also enlarged BPEAR's mandate to include legal assistance to refugees and rural resettlement programmes, and gave the Bureau a formal role in assisting the Commission in the formulation of OAU refugee policy.[41]

> Oloka-Onyango's extensive analysis of the BPEAR concluded that it has had
>
> great difficulty in meeting the conditions of its establishing mandate, and effectively expanding that mandate to deal with the critical issues concerning African refugees presently. The problems of the Bureau for Refugees basically stem from two factors: first, the fashion in which it has

[38] UNECA (n 35) 115; Holborn (n 33) 943.

[39] OAU (OCM), 'Resolution on the Bureau for the Placement and Education of African Refugees' (OAU Addis Ababa 15-19 June 1971) CM/Res 244 (XVII) para 1(a).

[40] OAU (OCM), 'Resolution on the OAU Bureau for the Placement and Education of African Refugees' (OAU Mogadishu 6-11 June 1974) CM/Res 346 (XXIII) para 1.

[41] ibid.

> conceptualized its role, which is also a function of the influence of the OAU over its programming. The second issue relates to the question of finances.[42]

Others have echoed his view. Nobel, for example, explains that while

> potentially helpful, the BPEAR has been a disappointment due to what appears to be incompetence and mismanagement. A critical analysis has identified problems in the lack of efficient correspondents in member states, lack of economic support, and perhaps, weaknesses inherent in the OAU system itself.[43]

Such generalised problems translated into quite specific shortcomings. For example, the Bureau's work on implementing the 1969 Convention was judged a failure, with it ultimately abandoning its 'attempt to persuade member States either to incorporate the provisions of the 1969 Convention into their domestic law, or to amend their immigration and refugee legislation so that they are brought into conformity with the Convention'.[44] Moreover, Chartrand notes a disjuncture between the efforts of and investment in the Bureau on the one hand, and the number of refugees actually placed in employment or education on the other.[45]

Perhaps as a response to such critiques, in the early 1990s BPEAR was renamed the Bureau for Refugees, Displaced Persons and Humanitarian Assistance.[46] However this further change did not solve its problems:

> conceptually, the successive changes in the nomenclature of the bureau may reflect a metamorphosing mandate, and are in part reflective of the role that the bureau was supposed to play in the ever-changing refugee situation on

[42] Oloka-Onyango (n 11) 47.

[43] Peter Nobel, 'Refugees, Law, and Development in Africa' (1982) 3 Mich YB Intl L Stud 255, 258.

[44] Oloka-Onyango (n 11) 49.

[45] Chartrand (n 11) 280.

[46] Murray (n 11) 197.

> the continent. However, in practical terms the operations of the office have remained largely the same since its inception.[47]

Thus, not surprisingly, the transition from the OAU to the AU marked the demise of the Bureau for Refugees, Displaced Persons and Humanitarian Assistance.[48] Its Coordinating Committee did, however, survive, but under another name, as explained below.

(c) The Coordinating Committee on Assistance to Refugees

The standing committee and consultative board formed to advise BPEAR merged in 1970 to form the Bureau's Coordinating Committee.[49] In 1974, as part of the BPEAR restructuring described above, the Coordinating Committee's membership was expanded to include representatives from the Executive Secretariat of the OAU's Liberation Committee and the Chairman of the Annual Conference of Liberation Movements, and its role was formalised.[50] Then, in 1981, the Coordinating Committee was re-named the CCAR and given a specific mandate to assist the OAU's Secretary General with the organisation of the ICARA conference (defined and described below). In spite of this specific mandate, the CCAR also evolved into an advisory committee to the Commission and a liaison body between the BPEAR and the outside agencies that provided it with organisational support and funding.[51]

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[47] Lawyers Committee for Human Rights, *African Exodus: Refugee Crisis, Human Rights and the 1969 OAU Convention* (Lawyers Committee for Human Rights 1995) 140.

[48] Murray (n 11) 200.

[49] Holborn (n 33) 943.

[50] OAU (n 40) para 1.

[51] Oloka-Onyango (n 11) 39.

According to Oloka-Onyango, the CCAR was not as successful as it might have been in fulfilling its broader mandate. He explains that

> even in the admission of members of the CCAR, it is clear that the Committee has not done as much as it could have, particularly in terms of meeting financial commitments made to Bureau programmes. At present, this body is largely inactive, in part because of the relative malaise of the Bureau, but also because the members of the committee do not fully believe in its effectiveness, or in the capacity of the OAU to tackle the refugee question in a forthright, non-political fashion.[52]

Despite such manifest failures, the CCAR, like the Commission, survived the transition to the AU as the CCAPRRI, the work of which is described below in the section devoted to the AU.

2. Special refugee protection initiatives

In addition to establishing dedicated refugee protection bodies, the OAU convened or co-convened a number of major conferences and meetings devoted to aspects of refugee protection in Africa. Twelve years after the 1967 Addis Ababa conference discussed in chapter 2,[53] the OAU co-hosted its next significant gathering devoted to refugees: the Pan-African Conference on the African Refugee Problem, held in Arusha, Tanzania, from 7 to 17 May 1979.[54] While the conference was hosted by the OAU and UNHCR, with assistance from ECA, it was an initiative of the All African Conference of Churches. The umbrella organisation

> sensed that a new refugee conference was needed primarily to document the sufferings and problems of large numbers of refugees before their existence

[52] ibid 40.

[53] See chapter 2, section D.5.

[54] Extensive documentation and analysis of this gathering can be found in Lars-Gunnar Eriksson, Goran Melander and Peter Nobel, *An Analysing Account of the Conference on the African Refugee Problem, Arusha, May 1979* (Scandinavian Institute of African Studies 1981).

> could be denied completely by many political leaders of independent Africa. Equally important was the task of discussing these difficulties and possible solutions with the international community, the intergovernmental organizations, the nongovernmental organizations, and the voluntary agencies.[55]

The conference was attended at ministerial level by 38 OAU member states, 20 non-African countries, five liberation movements recognised by the OAU, 16 inter-governmental and regional organisations and 37 NGOs involved in refugee work in Africa.[56] It adopted a range of recommendations, which can be divided into two categories: the legal and protection problems of refugees, and the socio-economic, institutional, administrative and financial problems refugees can engender.[57] Among recommendations in the first category, recommendation 7 called on OAU member states that had not already done so to ratify the 1951 Convention, its 1967 Protocol and the 1969 Convention and to incorporate them into domestic law.[58] The CM endorsed the conference's recommendations;[59] they subsequently received the support of the UN General Assembly.[60]

Following the Arusha conference, the OAU and UNHCR constituted a joint working party for the implementation of its recommendations. The working group met for the first time in May 1980 in Addis Ababa and ultimately recommended a

[55] Nobel (n 43) 259.

[56] Greenfield (n 11) 225.

[57] D'Sa (n 11) 391; for a summary of the conference's recommendations, see D'Sa (n 11) 391–4; the recommendations are reproduced in their entirety in Eriksson, Melander and Nobel (n 54) 47–62.

[58] Eriksson, Melander and Nobel (n 54) 52.

[59] OAU (OCM), 'Resolution on the Situation of Refugees in Africa and on Perspective Solutions to their Problems in the 1980s' (OAU Monrovia 6-20 July 1979) CM/Res 727 (XXXIII) Rev 1, para 2.

[60] UNGA, Res 34/61 (29 November 1979).

plan of action.[61] At its second meeting, the working party adopted model legislation for the domestic implementation of the 1969 Convention, which ultimately influenced how many states incorporated it.[62]

The next major conference to address refugee protection in Africa was convened not by the OAU but by the UN Secretary General further to a CM resolution, which invited

> [t]he Secretary-General of the OAU in collaboration with the UN Secretary-General and … [UNHCR] to hold consultations with governmental and non-governmental organizations as well as governments of countries which are likely to offer contributions and the UN Specialized Agencies, in order to assess the possibility of holding a pledging conference for African refugees under the auspices of the United Nations.[63]

The UN General Assembly subsequently noted the inadequacy of the assistance provided to African refugees[64] and the UN Secretary General, in cooperation with the OAU and UNHCR, accordingly convened the International Conference on Assistance to Refugees in Africa (ICARA), to 'mobilize assistance for refugees in Africa'.[65] ICARA was held on 9 and 10 April 1981 in Geneva and raised approximately US$558 million,[66] however none of these funds were allocated directly to the OAU. Rather, they went to cover UNHCR programmes in Africa. The OAU had by then,

[61] D'Sa (n 11) 394.

[62] Ivor C Jackson, *The Refugee Concept in Group Situations* (Martinus Nijhoff 1999) 194–6.

[63] OAU (n 27) para 8.

[64] UNGA, Res 35/42 (25 November 1980) preambular para 8.

[65] ibid para 3.

[66] UNSG, 'Report of the Secretary General on the International Conference on Assistance to Refugees in Africa' UN Doc A/37/522 (1982) 11; see, also, OAU (Secretary General), 'Report of the Secretary General on the International Conference on Assistance to Refugees in Africa' CM/1130 (XXXVII) Rev 1.

however, established a Special Refugee Contingency Fund, which received two per cent of the OAU's regular budget[67] and to which UNHCR contributed.

The OAU Secretariat convened a meeting of NGOs involved in assisting refugees in Africa from 21 to 25 March 1983 in Arusha. While not on the same scale as the Arusha meeting before it, the gathering's opening address was delivered by President Nyerere of Tanzania, suggesting that the refugee issue remained a high profile one. The meeting produced a range of recommendations under 12 broad headings,[68] including 'Preparation for ICARA II'. Indeed, further to the success of ICARA, a second fundraising conference was at the request of the UN General Assembly[69] convened by the UN Secretary General, the OAU and UNHCR in Geneva from 9 to 11 July 1984. This time, however, funds were raised for UNHCR as well as to assist African host countries, 14 of which submitted 128 proposals for specific infrastructural projects in advance of the conference.[70] ICARA II also resulted in the adoption by consensus of a Declaration and Programme of Action aimed at an effective long-term strategy for African refugees.[71]

[67] OAU, 'Second OAU/ICRC Seminar for African Ambassadors Accredited to Ethiopia: The OAU and Humanitarian Problem' (OAU Addis Ababa 11-12 April 1995) BR/58/LM/9/95, 5.

[68] Preparation for ICARA II; protection; voluntary repatriation; awareness building and public information; cooperation in refugee assistance at the national, regional and international levels; root causes; education, training and scholarships; employment; counselling; settlement and resettlement; role of voluntary agencies during emergencies; and general (OAU, 'Recommendations of the Meeting of the OAU Secretariat and Voluntary Agencies on African Refugees' (OAU Arusha 21-25 March 1983)).

[69] UNGA, Res 37/197 (18 December 1982) para 5.

[70] D'Sa (n 11) 396.

[71] UN, 'Declaration and Program of Action of the Second International Conference on Assistance to Refugees in Africa' UN Doc A/CONF.125/L.1 (10 July 1984).

While preparations for ICARA II were on-going, the OAU turned its attention from fundraising back to substantive issues, in particular to the situation of refugees from the racist regime ruling South Africa. At its Fortieth Ordinary Session, held in Addis Ababa in February and March 1984, the CM called on the Southern African Development Co-ordinating Conference (now the Southern African Development Community) to organize, in collaboration with the OAU, UN and UNHCR, 'an international conference on all aspects of the refugee problem in Southern Africa, in order to co-ordinate and harmonize approaches to refugee matters'.[72] In July 1986, the CM called for substantive preparations to begin.[73] The conference, titled 'International Conference on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa' (SARRED), was held in Oslo, Norway, from 22 to 24 August 1988. It resulted in the adoption of the Oslo Resolution, Declaration and Plan of Action on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa,[74] which was subsequently endorsed by the CM.[75]

[72] OAU (OCM), 'Resolution on the Situation of Refugees in Africa' (OAU Addis Ababa 27 February-5 March 1984) CM/Res 939 (XL) para 5.

[73] OAU (OCM), 'Resolution on the Situation of Refugees in Africa' (OAU Addis Ababa 21-26 July 1986) CM/Res 1040 (XLIV) para 14; see, also, OAU (OCM), 'Resolution on International Conference on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa, Oslo, Norway 22-24 August 1988' (OAU Addis Ababa 19-23 May 1988) CM/Res 1150 (XLVIII).

[74] OAU, 'Oslo Resolution, Declaration and Plan of Action on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa' (OAU Oslo 22-24 August 1988) <http://www.unhcr.org/refworld/category,POLICY,UNGA,,,3ae68f410,0.html> accessed 10 October 2011; the declaration portion of the Oslo document addressed root causes; basic principles on humanitarian assistance (the linkage between relief, recovery and development assistance and burden sharing); and specific refugee related issues (asylum and military and armed attacks on refugees). The plan of action addressed humanitarian and rehabilitation assistance (emergency preparedness, needs assessment and the delivery of assistance, recovery and development and the mobilisation of resources); durable solutions (voluntary repatriation and return, local integration and resettlement); public information and dissemination; and follow-up and evaluation.

[75] OAU (OCM), 'Resolution on the International Conference on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa' (OAU Addis Ababa 20-25 Feberuary 1989) CM/Res 1181 (XLIX) para 3.

In 1994, the OAU and UNHCR co-convened the 'Commemorative Symposium on Refugees and the Problems of Forced Population Displacements in Africa'.[76] The impetus for the symposium came from a resolution issued by the CM.[77] Held from 8 to 10 September in Addis Ababa, the gathering commemorated the twenty-fifth anniversary of the adoption of the 1969 Convention and twenty years since its entry into force. It also had a substantive purpose, evidenced by the 34 recommendations it produced in the form of the Addis Ababa Document on Refugees and Forced Population Movements in Africa.[78] The Document's ten topics[79] were broadly representative of the Symposium's main themes.[80] Among the recommendations, number 5 called on states to ratify, uphold, domesticate and implement the 1969 Convention. While the Symposium was a success in terms of the sheer number of participants it attracted—340 from OAU member states, other states, UN agencies and NGOs—it failed to advance thinking on substantive issues. Rather,

> the Symposium succeeded mainly only in echoing the familiar call urgently to address the root causes of refugee flows and other forms of coerced population movements. Having not tackled root causes with any rigour, it also could not etch out clearly the essential legal, policy, and operational groundmarks for tackling those issues in a concrete and result-producing manner.[81]

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[76] Okoth-Obbo (n 22) provides an extensive analysis of this symposium.

[77] OAU (OCM), 'Resolution on Refugees, Returnees and Displaced Persons in Africa' (OAU Addis Ababa 31 January-4 February 1994) CM/Res 1489 (LIX) para 10.

[78] OAU and UNHCR, 'The Addis Ababa Document on Refugees and Forced Population Displacements in Africa, adopted by the OAU/UNHCR Symposium on Refugees and Forced Population Displacements in Africa, 8-10 September 1994, Addis Ababa, Ethiopia' [Special Issue Summer 1995] IJRL 303.

[79] Root causes; the 1969 Convention; refugee protection in Africa; material assistance; internal displacement; solutions; other populations in need of protection and assistance; emergency preparedness and response; the relief to development continuum; and institutional aspects.

[80] Okoth-Obbo (n 22) 285.

[81] ibid 281.

Just as South Africa's apartheid regime had focused OAU attention on refugees in southern Africa, resulting in SARRED, the 1994 Rwandan genocide and the related refugee crisis led to a series of initiatives focused on the Great Lakes region. First was the OAU/UNHCR Regional Conference on Assistance to Refugees, Returnees and Displaced Persons in the Great Lakes Region, held in Bujumbura, Burundi, from 12 to 17 February 1995. This meeting resulted in a Plan of Action; the UN General Assembly later reiterated that it continued 'to be a viable framework for the resolution of the refugee and humanitarian problems in that region'.[82] Its implementation led to a series of follow up meetings.[83] On 8 and 9 May 1998, the OAU and UNHCR held another regional meeting on refugee issues in the Great Lakes region, this time in Kampala. Around the same time, there was also a focus on refugee women and children as particular populations of concern: from 12 to 15 October 1998, the OAU convened in Addis Ababa its Regional Seminar on Enhancing the Participation of Returnee, Refugee and Internally Displaced Women and Children in Reconstruction, Rehabilitation and Peace-Building. The seminar adopted a Plan of Action.[84]

Many of the OAU's special refugee protection initiatives were organised in partnership with UNHCR and other UN agencies. However, one of the last refugee-related gatherings before the OAU became the AU was an exclusively OAU affair: the OAU Ministerial Meeting on Refugees, Returnees and Internally Displaced

[82] UNGA, Res 51/71 (12 December 1996) para 9.

[83] For example, in February 1996, the Second Meeting of the Follow-Up Committee on the Implementation of the Bujumbura Conference Plan of Action on Assistance to Refugees, Returnees and Displaced Persons in the Great Lakes Region.

[84] OAU, 'Plan of Action for Enhancing the Participation of Refugee, Returnee and Internally Displaced Women and Children in Rehabilitation, Reintegration, Reconstruction and Peace-Building' (OAU Addis Ababa 12-15 October 1998).

Persons in Africa, held in Khartoum, Sudan, on 13 and 14 December 1998. The meeting produced both a Declaration[85] and recommendations.[86] The former included an appeal for states to ratify the 1951 Convention, its 1967 Protocol and the 1969 Convention, and to domesticate and implement them. The latter consisted of 34 recommendations grouped under seven broad themes.[87]

The OAU's final special refugee protection initiative, co-organised with UNHCR, was a meeting of government and non-governmental experts held in Conakry, Guinea, from 27 to 29 March 2000, on the occasion of the thirtieth anniversary of the adoption of the 1969 Convention. This meeting 'consolidated the OAU's approach [to refugees] and directed the way in which it would operate in the future'[88] and resulted in a Comprehensive Action Plan.[89] This was subsequently endorsed by the CM,[90] referred to by the OAHG[91] and is considered the regional

[85] OAU, 'Khartoum Declaration of the OAU Ministerial Meeting on Refugees, Returnees and Internally Displaced Persons in Africa' (OAU Khartoum 14 December 1998); not to be confused with the Khartoum Declaration of 1990 (n 30).

[86] OAU, 'Khartoum Recommendations of the OAU Ministerial Meeting on Refugees, Returnees and Internally Displaced Persons in Africa' (OAU Khartoum 14 December 1998).

[87] Root causes; refugee instruments; strengthening refugee protection in Africa; durable solutions; consolidating the reintegration process; building Africa's capacity to respond to refugee and internal displacement situations; and assistance and resolving the problem of internally displaced persons in Africa.

[88] Murray (n 11) 192.

[89] OAU and UNHCR, 'Comprehensive Action Plan adopted by the Special OAU/UNHCR Meeting of Government and Non-Government Technical Experts on the Thirtieth Anniversary of the 1969 OAU Refugee Convention' (OAU & UNHCR Conakry 27-29 March 2000) CONFP/OAU30th/CORE/4-Rev1.

[90] OAU (OCM), 'Decision on the Situation of Refugees, Returnees and Displaced Persons in Africa' (OAU Lomé 6-8 July 2000) CM/Res 2171 (LXXII) para 8.

[91] OAU (OAHG), 'Decision on the Fiftieth Anniversary of the Adoption of the 1951 Convention on the Status of Refugees' (OAU Lusaka 9-11 July 2001) AHG/Dec 6 (XXXVII) preambular para 6.

complement to the 2002 Agenda for Protection,[92] which resulted from the Global Consultations on International Protection convened by UNHCR in 2000.[93] Among the recommendations contained in the Action Plan, one suggested that UNHCR and the OAU convene a working group to consider amendments to the 1969 Convention, including the designation of an oversight body.[94] Another directed UNHCR to conclude a Memorandum of Understanding with the African Commission, in order to strengthen 'its monitoring capacity and programme of work with respect to the human rights of refugees and asylum seekers'.[95] This Memorandum of Understanding was ultimately concluded in 2003 and is discussed further in chapter 7. The recommendation concerning a UNHCR-OAU working group on amendments to the 1969 Convention, by contrast, was never implemented.

While this and indeed most of the recommendations flowing from the OAU's various special refugee protection initiatives seem sound, there is reason to be sceptical. An NGO delegate to the 1994 Commemorative Symposium remarked,

> there is no shortage of declarations, recommendations, or plans of action to solve the refugee and displacement crisis in Africa. If even half of these were to be implemented, there would be virtually no refugees or displaced persons in Africa today and none for the whole of the twenty-first century.[96]

The sheer number of declarations, recommendations and plans of action emanating from gatherings in Africa devoted to refugees evidences the essential truth of this somewhat sweeping observation; if even one plan of action were to be successfully

[92] Beyani (n 34) 7.

[93] UNGA, 'Agenda for Protection' UN Doc A/AC.96/965/Add.1 (26 June 2002).

[94] OAU and UNHCR (n 89) action 4.

[95] ibid action 15.

[96] Cited in Okoth-Obbo (n 22) 297.

implemented, there would likely be little need for all those that came after it. Indeed, Okoth-Obbo notes that a number of conference documents have not shown a record of implementation commensurate with the effort and cost of their elaboration.[97]

These documents do, however, trace and provide a historical record of the OAU's evolving approach to refugees. The OAU initially viewed refugees predominantly as a threat to inter-African relations, a focus reflected in the 1969 Convention. Later, the relationship between refugees and development came to the fore.[98] Finally, increasing regard for human rights resulted in recognition of the linkages between human rights violations and forced population displacement.[99] Indeed, recognition of the importance of human rights—for which the OAU had no clear mandate—contributed to the decision to replace the OAU with the AU. Not surprisingly, therefore, the connection between the protection and promotion of human rights on the one hand and refugee protection on the other constitutes a salient feature of AU engagement with refugees. This engagement is detailed below.

[97] ibid 298.

[98] Nyanduga (n 3) 99.

[99] See, for example, OAU, 'Grand Bay (Mauritius) Declaration and Plan of Action' (OAU Grand Bay 12-16 April 1999) CONF/HRA/Dec 1, para 9, which provides: '[w]hile welcoming the improvements which have taken place in addressing the refugee problem, the conference believes that the high number of refugees, displaced persons and returnees in Africa constitutes an impediment to development. It recognizes the link between human rights violations and population displacement and calls for redoubled and concerted efforts by States and the OAU to address the problem'.

C. AU ENGAGEMENT WITH REFUGEE PROTECTION: 2002 TO 2015

1. The AU

The end of the Cold War precipitated major political change in Africa. Democracy began to take root and in 1990 Namibia, the last African state under colonial rule, gained its independence. The first formal indication of the OAU's declining relevance within this new political landscape came in the form of the 1990 Declaration on the Political and Socio-Economic Situation in Africa,[100] which acknowledged that the 'era of focusing mainly on "political liberation and nation building" should make way for a new era of greater emphasis on economic development and integration'.[101] This economic development agenda was concretised in 1991 with the adoption of the Abuja Treaty.[102] Its primary objective was 'to promote economic, social and cultural development and the integration of African economies'[103] through the gradual coordination of the continent's existing sub-regional economic communities and the establishment of new policies, programmes and institutions over 34 years.[104] Only eight years later, however, African leaders committed to forming an African union that would fast track the creation and implementation of the institutions contemplated by the Abuja Treaty.[105] This new continental organisation superseded the OAU and

[100] OAU (OAHG), 'Declaration on the Political and Socio-Economic Situation in Africa' (OAU Addis Ababa 9-11 July 1990) AHG/Dec.1(XXVI).

[101] ibid para 12, cited in Viljoen (n 9) 161.

[102] Treaty Establishing the African Economic Community (adopted 3 June 1991, entered into force 12 May 1994) 30 ILM 1241.

[103] ibid art 4(1)(a).

[104] ibid art 4(2).

[105] OAU (OAHG), 'Sirte Declaration' (OAU Sirte 9 September 1999) AHG/Draft/Decl (IV) Rev 1.

incorporated the AEC on 26 May 2001, when its Constitutive Act entered into force.[106] Viljoen describes it as 'essentially a merger of the largely political ambitions of the OAU and the mainly economically minded AEC, with the addition of some organs and with an acceleration of pace in economic integration'.[107]

The AU's objectives thus reflect the Abuja Treaty's economic development agenda while also recognising the importance of social and democratic development and according particular prominence to human rights. Indeed, of the AU's 16 guiding principles, six make either explicit or implicit reference to human rights,[108] and the AU's objectives are similarly human rights focused. According to its Constitutive Act, the AU aims to achieve unity and solidarity among African states and peoples; defend the sovereignty, territorial integrity and independence of its member states; accelerate African political and socio-economic integration; promote and defend common African positions; encourage international co-operation; promote peace, security, stability, democracy, good governance and human and peoples' rights; foster strong African participation in the global economy and international relations; promote sustainable development, the integration of African economies and co-operation in all fields of human activity; co-ordinate and harmonise policies across the various regional economic communities; promote research; and engage in international co-operation for public health.[109] According to Viljoen, the AU 'not only sets out to attain human rights *objectives* but also intends to use human rights-

[106] Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) 2158 UNTS 3 (AU Constitutive Act).

[107] Viljoen (n 9) 164.

[108] ibid 165.

[109] AU Constitutive Act (n 106) art 3.

based means (or *principles*) to achieve those objectives', which 'evidences its resolve to make a clean break from the OAU's *modus operandi*'.[110]

The AU's machinery to achieve its range of goals is more extensive than was that of the OAU. The AU is composed of: the Assembly of Heads of State and Government, which determines common policies; the Executive Council, which is composed of ministers or other authorities designated by member states to coordinate such policies; the AU Commission, which is the regional body's Addis Ababa-based secretariat and handles eight discrete portfolios;[111] the PRC, which prepares the work of the Executive Council; the PSC, which makes decisions on the prevention, management and resolution of conflicts; the Pan-African Parliament, which is the AU's legislative arm, whose members are elected by the legislatures of AU member states; the Economic, Social and Cultural Council, an advisory organ composed of social and professional groups from member states; the Court of Justice, which was to adjudicate disputes between member states stemming from AU legal instruments but was never actually established (it is discussed further in chapter 7); the Specialized Technical Committees,[112] which assist the Executive Council in substantive matters; and the financial institutions, which are the African Central Bank, the African Monetary Fund and the African Investment Bank. The AU also includes *ad hoc*

[110] Viljoen (n 9) 165.

[111] Peace and security; political affairs; infrastructure and energy; social affairs; human resources, science and technology; trade and industry; rural economy and agriculture; and economic affairs.

[112] The AU Constitutive Act provides for seven Specialized Technical Committees: the Committee on Rural Economy and Agricultural Matters; the Committee on Monetary and Financial Affairs; the Committee on Trade, Customs and Immigration Matters; The Committee on Industry, Science and Technology, Natural Resources and Environment; the Committee on Transport, Communications and Tourism; the Committee on Health, Labour and Social Affairs; and the Committee on Education, Culture and Human Resources (AU Constitutive Act (n 106) art 14).

bodies, such as the Panel of the Wise, a panel of five eminent persons drawn from each of the continent's regions with a mandate to prevent conflict.

Just as the AU's objectives and institutional architecture differ from those of its predecessor, so too does its view of refugees. The AU's approach to refugees is strongly linked to its focus on human rights. This connection was initially evidenced in the Kigali Declaration, the outcome of the First AU Ministerial Conference on Human Rights. The Declaration called on member states to recognise forced displacement as a grave violation of human rights to peace, security and dignity.[113] The centrality of human rights in the AU's approach to refugees is in part the result of changing patterns of forced displacement. When the OAU first addressed refugee protection with the 1969 Convention, 'the major cause for refugees was the problem related to colonial occupation' but 'as the years went by, civil wars and ethnic conflict in many member States became a major cause of refugee outflow'.[114] In addition to focusing attention on human rights, new causes of displacement also served to widen the AU's focus: whereas the OAU had primarily been focused on refugees, the AU pays equal attention to IDPs and returnees.

While the shift from the OAU to the AU heralded a more rights-based approach to refugees and brought IDPs and returnees to the fore, the transition was also a missed opportunity. The adoption of the AU's Constitutive Act raised the

[113] OAU, 'Kigali Declaration of the First AU Ministerial Conference on Human Rights in Africa' (OAU Kigali 8 May 2003) MIN/CONF/HRA/Decl1 (I) para 11.

[114] Nyanduga (n 3) 96.

prospect of creating a dedicated continental refugee protection body,[115] or at the very least the opportunity of creating a body to supervise the 1969 Convention. Neither of these opportunities was seized. Instead, the AU developed a number of bodies responsible for refugee issues with distinct political, advisory and technical roles but a shared tendency towards mission creep. The transition from the OAU to the AU was initially marked by IDPs and returnees assuming increased importance; now, over a decade later, refugee protection is gradually being subsumed within the AU's broader humanitarian work, as will be demonstrated below.

2. AU refugee protection bodies

(a) The Permanent Representatives Committee's Sub-Committee on Refugees, Returnees and Internally Displaced Persons

The PRC is a political body composed of representatives from each AU member state and is charged with assisting and preparing the work of the Executive Council. Its Sub-Committee on Refugees, Returnees and Internally Displaced Persons, a committee of the whole, is the AU incarnation of the former OAU Commission on Refugee Problems in Africa. It is a decision-making body, acting on its own as well as by raising issues to the Executive Council.[116] In particular, it provides political leadership in formulating AU responses to humanitarian emergencies, informed by

[115] Nierum S Okogbule, 'The Legal Dimensions of the Refugee Problem in Africa' (2004) 10 E Afr J Peace & Hum Rts 176, 189.

[116] Patrick Tigere and Rita Amukhobu, 'The African Union's Institutional Framework for Responding to Forced Displacement in Africa' [2005] Conflict Trends 48, 53.

field missions and in-country needs assessments;[117] where possible, provides refugee hosting states with financial assistance; and works to sensitise AU member states and the international community to the plight of displaced persons in Africa.[118] As a committee of the whole, the Sub-Committee is represented by a bureau of five member states, which meets as often as is necessary. The complete Sub-Committee meets twice per year.[119]

Despite its refugee-focused nomenclature, the PRC Sub-Committee views its mandate in broader terms, as encompassing humanitarian affairs more generally.[120] This may be due in part to the degree to which it relies on and defers to HARDP. Lacking in refugee protection experts among its ambassador members, the PRC Sub-Committee relies heavily on HARDP, with which it works closely and which is its secretariat. HARDP's mandate is not limited to refugees but includes humanitarian affairs more generally; it is not surprising that this broader focus has impacted HARDP's political counterpart. In January 2014, a decision of the AU's Executive Council stressed 'the need to review and clarify' the PRC Sub-Committee's role to enable it to effectively fulfil its mandate.[121]

[117] Most recently to Côte d'Ivoire, Liberia, Sierra Leone and Tunisia.

[118] Tigere and Amukhobu (n 116) 53.

[119] ibid.

[120] Interview with Olabisi Dare, Director, HARDP, 16 January 2012, Addis Ababa.

[121] AU (Executive Council), 'Decision on the Report of the Sub-Committee on Refugees, Returnees and Internally Displaced Persons in Africa' (AU Addis Ababa 21-28 January 2014) EX.CL/Dec.802 (XXIV) para 4.

(b) The Coordinating Committee on Assistance and Protection to Refugees, Returnees and Internally Displaced Persons

This advisory body was born under the OAU as the BPEAR's Coordinating Committee, and later became the CCAR. As an AU organ, it is now known as the CCAPRRI. Committee membership is open to AU member states, relevant UN agencies, inter-governmental organisations and NGOs.[122] A subset of CCAPRRI members resident in Addis Ababa form the body's Working Group, which has a mandate to assist HARDP in its day-to-day activities[123] and prepare the work of the Committee as a whole.[124]

The Committee's broad functions are derived from its 2006 Rules of Procedure, which due to their scope are worth reproducing:

> (a) advise the AU Commission, the PRC Cub-Committee on Refugees, … [regional economic communities] and relevant … [AU] organs, including the African Commission … on matters that promote the better protection, assistance and the search for durable solutions for refugees, returnees and … [IDPs] in Africa, with particular focus on the special needs of vulnerable groups …;
> (b) perform as an advisory group that promotes policies on the protection and assistance of refugees, returnees and IDPs as well as propose strategies for mainstreaming of various principles contained in the relevant regional and international legal instruments including the 1969 … Convention …;
> (c) provide a platform for the exchange of data and information, experiences, best practices and lessons learnt as well as analyze policy formulation and recommendations and advise on areas of intervention, modalities of engagement and strategies of implementation in order to improve concerned human protection and relief assistance at country level;

[122] CCAPRRI, 'Rules of Procedure of the AU Coordinating Committee on Assistance and Protection to Refugees, Returnees and Internally Displaced Persons in Africa' (CCAPRRI Addis Ababa 9 November 2006) POL/DIR/113/2927 (XXVIII) art II.

[123] ibid art VI.

[124] Interview with Millicent Mutuli, Deputy Representative, UNHCR Representation to the AU and the ECA, 16 January 2012, Addis Ababa.

> (d) ensure wide dissemination of important resolutions and decisions adopted by relevant AU organs;
> (e) establish modalities and/or plans of action, including a mechanism for monitoring and reporting to the PRC Sub-Committee on Refugees on the implementation of relevant resolutions and decisions;
> (f) coordinate efforts of members of the CCAR in order to harmonize their policies and activities and ensure complementarity in their programmes relating to refugees, returnees and IDPs;
> (g) mobilize support for capacity and institution building activities of member organizations, refugee hosting countries and other organizations particularly indigenous African NGOs involved in the protection and assistance to refugee, returnees and IDPs;
> (h) assist and support the AU and member organizations in mobilizing resources necessary to ensure the smooth functioning of the Coordinating Committee and the implementation of planned activities;
> (i) assist and support the AU and member organizations in mobilizing support and resources for refugees, returnees, IDPs and other related humanitarian activities;
> (j) provide early warning and advice on the prevention of large-scale forced population displacement and humanitarian catastrophes, and support African countries and communities hosting refugees and IDPs on adequate, timely and appropriate preparedness, and response to emergency situations; as well as advocate for comprehensive peace building, reconstruction and development for countries emerging out of conflict to ensure that the needs of displaced persons are addressed;
> (k) undertake any other assignment as, and when, necessary and requested by the AU Commission and/or the AU decision-making organs;
> (l) play the role of advocacy on issues related to refugees, returnees and … [IDPs] regarding their assistance and protection on humanitarian needs.[125]

Despite this wide mandate, in practice the CCAPRRI focuses on its function as an advisory body to the PRC Sub-Committee on Refugees, Returnees and Internally Displaced Persons, providing 'a forum and interface between the [refugee] practitioners and the [AU's] decision-making and policy organs'.[126] Activities that would fall under its other functions are often overlooked. For example, at a 2003 meeting between UNHCR and the African Commission, it was suggested that CCAPRRI should 'examine the feasibility of promoting the adoption of a Protocol to the 1969 … Convention which would expand its scope to cover issues not adequately

[125] CCAPRRI (n 122) art I.

[126] Tigere and Amukhobu (n 116) 53.

addressed therein'.[127] This never occurred. Moreover, even in its limited role as an advisory body to the PRC Sub-Committee, CCAPRRI is remarkably weak.

In 2004, further to a request from the Executive Council, the AU Commission and UNHCR began working together to revitalise the CCAPRRI, in particular by updating its membership.[128] The request was reiterated in January 2005 'as a matter of urgency'.[129] According to Tigere and Amukhobu, new members were secured by mid-2005,[130] when the Executive Council commended the AU Commission and UNHCR for their efforts in this regard.[131] Further revitalisation followed: the Committee's 2006 Rules of Procedure entered into force when they were adopted by the AU's Executive Council in 2008[132] and a renewed search for additional members began in 2009[133] and remained on-going as of early 2012.[134]

Despite these procedural revitalisations, the CCAPRRI has remained substantively dormant. In the 2008 decision that adopted the Committee's revised Rules of Procedure, the Executive Council also requested that the AU Commission

[127] Murray (n 11) 195.

[128] AU (Executive Council), 'Decision on the Situation of Refugees, Returnees and Displaced Persons' (AU Addis Ababa 30 June-3 July 2004) EX/CL/Dec127 (V) para 12.

[129] AU (Executive Council), 'Decision on the Situation of Refugees, Returnees and Displaced Persons' (AU Abuja 24-28 January 2005) EX/CL/Dec179 (VI) para 7.

[130] Tigere and Amukhobu (n 116) 53.

[131] AU (Executive Council), 'Decision on the Situation of Refugees, Returnees and Displaced Persons' (AU Sirte 28 June-2 July 2005) EX/CL/Dec197 (VII) para 10.

[132] AU (Executive Council), 'Decision on the Rules of Procedure of the Revitalized African Union Coordinating Committee on Assistance and Protection to Refugees, Returnees and Internally Displaced Persons in Africa' (AU Addis Ababa 25-29 January 2008) EC/CL/Dec382 (XII) para 1.

[133] AU 'Statement of HE Mrs Julia Dolly Joiner AU Commissioner for Political Affairs to the 59th Session of the Executive Committee of the High Commissioner's Programme' (6–10 October 2009) 1.

[134] Mutuli interview (n 124).

'reactivate the Coordinating Committee as soon as possible'.[135] Such has not occurred in any meaningful way. In 2011, the CCAPRRI Working Group convened a task force to revitalise the Committee,[136] yet in early 2012, relevant officials in Addis Ababa described CCAPRRI as 'dormant' at best and, at worst, as 'defunct'. Moreover, as of January 2012 the body's 2011 annual meeting—which is supposed to he held every October under the auspices of HARDP, the Committee's secretariat—had yet to occur.[137] Indeed, as of early 2012, CCAPRRI had not met since 2010,[138] and document-based research up to date as of 1 June 2015 revealed no record of any recent CCAPRRI meetings.

Despite the CCAPRRI's inactivity, its 2011 annual meeting was set to expand the Committee's mandate to cover humanitarian assistance generally, with a corresponding name change to the Coordinating Committee on Humanitarian Affairs.[139] This shift could finally revitalise the body, but it is more likely that it would dilute its already weak refugee protection role, representing a significant missed opportunity. In CCAPRRI, there is a framework for the AU to receive support, advice and assistance—CCAPRRI's Rules of Procedure mandate its Working Group to assist HARDP in its regular activities—and for the creation of links between the AU's policy-oriented work and the operational activities of Committee member organisations. That CCAPRRI is currently not functioning is to

[135] AU (Executive Council) (n 132) para 2.

[136] Mutuli interview (n 124).

[137] ibid.

[138] Interview with Rita Amukhobu, HARDP, 18 January 2012, Addis Ababa.

[139] Dare interview (n 120).

the detriment of HARDP and hence the AU's refugee protection activities more generally.

(c) The Division of Humanitarian Affairs, Refugees and Displaced Persons

HARDP is a division of the AU Commission's Department of Political Affairs, which as a political department is 'mainly concerned with the development of policies for the advocacy of and assistance in ensuring that all African countries respect human rights as opposed to … legal implementation'.[140] HARDP is a technical body that functions as a secretariat to the political PRC Sub-Committee and the advisory CCAPRRI, in particular by facilitating their activities, decision-making and policy development.[141] For example, HARDP prepares the first draft of CCAPRRI's annual report,[142] as well as the first draft all PRC Sub-Committee reports for AU summits.[143] HARDP also coordinates the interface between the AU's humanitarian actors and its decision-makers[144] and takes the lead on all the technical aspects of the AU's policy in respect of refugees in particular and humanitarian affairs in general. For example, HARDP led the drafting of the AU's Humanitarian Policy Framework. According to Tigere and Amukhobu, HARDP is central to the 'coordination, documentation and

[140] Amanda Lloyd and Rachel Murray, 'Institutions with Responsibility for Human Rights Protection under the African Union' (2004) 48 J Afr L 165, 173.

[141] Tigere and Amukhobu (n 116) 53.

[142] CCAPRRI (n 122) art VII.

[143] Dare interview (n 120).

[144] Tigere and Amukhobu (n 116) 53.

liaison of the work of the AU Commission, AU organs and other partners on matters related to forced displacements'.[145]

HARDP's website explains that it has a mandate to:

> [p]rovide assistance in collaboration with other departments and relevant agencies/organizations to refugees, displaced persons and victims of humanitarian crisis;
> Harmonize policies and activities among countries and … [regional economic communities], including the repatriation and resettlement of displaced persons;
> Promote cooperation with relevant regional and international organizations;
> Promote international humanitarian law; [and]
> Seek for a lasting solution to the problems of refugees and displaced persons.[146]

Another HARDP source described its main activities—presumably undertaken with a view to discharging the above functions—as visiting AU member states affected by displacement, participating in meetings and seminars and monitoring the humanitarian crises that produce mass population movements on the continent.[147] Some practical examples of its work in this regard are described below in the section devoted to special AU refugee protection initiatives.

Despite its largely technical mandate, HARDP is enormously powerful. Due to CCAPRRI's inactivity and the lack of significant refugee protection expertise among the diplomats who sit on the PRC's Sub-Committee, HARDP has almost exclusive control over the PRC Sub-Committee's programme of work. Among its

[145] ibid.

[146] AU (HARDP), 'Humanitarian Affairs, Refugees and Displaced Persons Division' <http://www.africa-union.org/Structure_of_the_Commission/Political%20Affairs/x/Humanitarian%20Affair.pdf> accessed 4 November 2011.

[147] AU (HARDP), 'Humanitarian Affairs, Refugees and Displaced Persons' <http://www.africa-union.org/Structure_of_the_Commission/depPOLITICAL%20AFFAIRS%20DIRECTORATE.htm#HUMANITARIAN> accessed 4 November 2011.

agenda items, the PRC Sub-Committee selects certain of them to raise to the AU's Executive Council, which in turn may raise issues with the AHG. Thus HARDP—a technical division meant to serve as a secretariat to the political and advisory arms of the AU's refugee protection apparatus and staffed by only four overstretched individuals (one of whom is seconded from UNHCR)—exercises de facto control over the AU's entire refugee protection agenda. Given this power, it is perhaps not surprising that HARDP sometimes fails at its more clerical tasks, such as convening CCAPRRI's annual meeting. Moreover, it is important to note that refugee protection is only one among HARDP's many concerns: as is evident from its name, the division also has a broader humanitarian affairs mandate, which its Director is keen to embrace.[148] Save for those aspects of refugee protection that may fall within the mandates of the Department of Political Affairs' other divisions—such as Social Affairs—AU engagement with refugee protection is effectively controlled by four individuals for whom refugee protection is only one among a host of concerns.

3. Special refugee protection initiatives

Although the AU has never held an inter-organisational gathering along the lines of the OAU's 1967 Addis Ababa conference or its 1979 Arusha meeting,[149] for a time it regularly convened ministerial meetings on refugees, returnees and IDPs in Africa. The first such AU meeting was held in Ouagadougou, Burkina Faso, on 1 and 2 June

[148] Dare interview (n 120).

[149] It should, however, be noted that such inter-organisational gatherings still occur in Africa, though not, thus far, under AU auspices. One such meeting was the Regional Parliamentary Conference on Refugees in Africa, held in Cotonou, Benin, in June 2004. This meeting was organised by the African Parliamentary Union and UNHCR (UNHCR, *The State of the World's Refugees 2000: Fifty Years of Humanitarian Action* (OUP 2000) 49).

2006—eight years after the OAU's last ministerial meeting in Khartoum—at the behest of an Executive Council decision adopted the previous year.[150] The meeting resulted in the adoption of the Ouagadougou Declaration[151] and during the gathering it was decided that ministerial meetings devoted to forced displacement should be convened every two years.

Accordingly, ministers met again in November 2008 in Addis Ababa. There they worked towards an even higher-level gathering: the AU Special Summit on Refugees, Returnees and Internally Displaced Persons in Africa, which was ultimately held from 19 to 23 October 2009 in Kampala. The Special Summit produced the Kampala Declaration, which addressed prevention; protection; women, children and other vulnerable groups; the forging of partnerships to address forced displacement;[152] and, most importantly, adopted the landmark Convention for the Protection and Assistance of Internally Displaced Persons in Africa,[153] perhaps the most significant illustration of the way in which IDP protection has come to the fore in the AU.

The AU Commission, and hence HARDP, was tasked with implementing the Kampala Declaration and was requested to formulate a Plan of Action in this

[150] AU (n 129) para 8.

[151] AU, 'Ouagadougou Declaration of the Ministerial Meeting on Refugees, Returnees and Internally Displaced Persons in Africa' (AU Ouagadougou 1-2 June 2006) AU/MIN/HARDP/Decl1.

[152] AU, 'Kampala Declaration on Refugees, Returnees and Internally Displaced Persons in Africa' (AU Kampala 22-23 October 2009) Ext/Assembly/AU/PA/Draft/Decl (I) Rev1.

[153] Convention for the Protection and Assistance of Internally Displaced Persons in Africa (adopted 23 October 2009, entered into force 6 December 2012) 49 ILM 86.

regard.[154] To build consensus around and formalise its draft Plan of Action, on 4 and 5 June 2010 HARDP convened the third meeting of ministers in charge of forced displacement matters in Addis Ababa. The ministers adopted HARDP's Plan of Action and it was subsequently welcomed by the Executive Council.[155] A consultative meeting aimed at its implementation was convened by HARDP on 20 and 21 May 2011 in Kinshasa.

After this, some momentum seems to have been lost. The ministerial meetings on forced displaced that were to be convened every two years stopped occurring. After the May 2011 Kinshasa meeting, the next record of a gathering devoted at least in part to refugees is a reference to a 'Specialized Technical Committee Meeting on Migration, Refugees and Internally Displaced Persons',[156] scheduled to take place in Abuja, Nigeria, during the second half of 2014.[157] No record of this meeting was found; the Executive Council requested that a report on the meeting be presented to the January 2015 Assembly of the Union,[158] however documentation from this Assembly revealed no evidence of such a report.

[154] AU (Executive Council), 'Decision on the Situation of Refugees, Returnees and Internally Displaced Persons in Africa' (AU Addis Ababa 25-29 January 2010) EX/CL/Dec529 (XVI) para 6.

[155] AU (Executive Council), 'Decision on the Situation of Refugees, Returnees and Internally Displaced Persons in Africa' (AU Kampala 19-23 July 2010) EX/CL/Dec558 (XVII) para 4.

[156] It is unclear which Specialized Technical Committee was concerned. For a list of the AU's Specialized Technical Committees, see note 112.

[157] AU (Executive Council), 'Decision on the Humanitarian Situation in Africa' (AU Malabo 20-24 June 2014) EX.CL/828(XXV)vi, para 9.

[158] ibid.

4. Refugees within other AU initiatives

In addition to special initiatives devoted to them, refugees have also received the attention of more general AU initiatives. The CSSDCA, a policy development process, notes among its 'core values' that the 'plight of African refugees and internally displaced persons constitutes a scar on the conscience of African governments and people' and provides an undertaking to strengthen refugee protection.[159] Moreover, among the Conference's key performance indicators, all AU member states were expected to have ratified and implemented the 1969 Convention by 2003; it was proposed that the AU should review the Convention's scope by 2005, ensuring in particular the strength of oversight mechanisms; and states were requested to provide the Conference with information on the condition of refugees, the protection of their human rights and mechanisms for the mitigation of their situation.[160] Unfortunately, however, the CSSDCA was 'consigned to the rubbish heap of lofty declarations without implementation', and was overtaken by other institutional developments, principally the PSC.[161]

The PSC is the AU's collective security system, charged with decision-making for the prevention, management and resolution of conflicts.[162] It was established by a 2002 Protocol,[163] which entered into force in 2003, to replace the

[159] Murray (n 11) 193.

[160] ibid.

[161] Viljoen (n 9) 168.

[162] Jeremy Levitt, 'The Peace and Security Council of the African Union: The Known Unknowns' (2003) 13 Transnat'l L & Contemp Probs 109, 110.

[163] Protocol relating to the Establishment of the Peace and Security Council of the African Union (adopted 9 July 2002, entered into force 26 December 2003) (PSC Protocol).

OAU's Mechanism for Conflict Prevention, Management and Resolution. The PSC's responsibilities include 'the management of catastrophes and humanitarian actions that encompass situations where refugees, asylum seekers and IDPs will be present'.[164] Not surprisingly, then, the eleventh preambular paragraph of the Protocol establishing the PSC notes African states' concern that 'conflicts have forced millions of our people, including women and children, into a drifting life as refugees and internally displaced persons, deprived of their means of livelihood, human dignity and hope', and it commits the PSC to assisting member states affected by violent conflict through activities including the 'resettlement and reintegration of refugees' once hostilities have ceased;[165] no mention is made of assisting refugees during the period of conflict. The role of the PSC in assisting with the resettlement and reintegration of refugees was reiterated two years following the PSC Protocol's adoption in the AU's Solemn Declaration on a Common African Defence and Security Policy.[166]

The AU's Constitutive Act envisioned the establishment of a common African defence policy.[167] In 2004, AU member states adopted the Solemn Declaration on a Common African Defence and Security Policy, which articulates the scope and objectives of the policy and charges the PSC with its implementation,[168] but does not clearly establish the policy as such. The Declaration lists the 'plight of refugees and

[164] Abass and Mystris (n 10) 31.

[165] PSC Protocol (n 163) art 14(3)(d).

[166] AU (AHG), 'Solemn Declaration on a Common African Defence and Security Policy' (AU Sirte 28 February 2004) para 22.

[167] AU Constitutive Act (n 106) art 4(d).

[168] AU (n 166) para 3.

internally displaced persons and the insecurity caused by their presence'[169] as among the factors that 'engender insecurity' in Africa,[170] and lists the 'plight of African refugees and internally displaced persons'[171] as among the 'principles and values forming the basis of' the Policy.[172] The Declaration goes on to provide that a goal of the Common African Defence and Security Policy is to 'provide a framework for addressing the problems of refugees and internally displaced persons at the continental, regional and national levels'[173] and, relatedly, recognises the 1969 Convention as among the 'building blocks' of the Policy.[174]

A final AU initiative that is not directed at, but still considers, refugees is the African Charter on Democracy, Elections and Governance.[175] Its article 8(2) provides that states parties 'shall adopt legislative and administrative measures to guarantee the rights of women, ethnic minorities, migrants, people with disabilities, refugees and displaced persons and other marginalized and vulnerable social groups'. An audit of national legislation to analyse whether this commitment has produced real results is beyond the scope of this study, however in all likelihood the success of the African Charter on Democracy, Elections and Governance mirrors the effectiveness of AU engagement with refugee protection more generally, an issue addressed in the concluding section that follows.

[169] ibid para I(8)(iv)(n).

[170] ibid para I(8)(iv).

[171] ibid para II(12)(v).

[172] ibid para II(12).

[173] ibid para III(13)(v).

[174] ibid para VI(A)(1)(xxi).

[175] African Charter on Democracy, Elections and Governance (adopted 30 January 2007, entered into force 15 February 2012).

D. CONCLUSIONS

The OAU and AU have engaged consistently with refugee protection. Both organisations have adopted legal instruments, created bodies with refugee-focused mandates and staged gatherings resulting in resolutions, declarations, decisions, recommendations and plans of action. Whether such initiatives have been effective is, however, another matter. Many of the authors cited herein have questioned their efficacy. According to Nyanduga, 'accountability for violations of refugee rights is lacking' and the '[u]nenforceability of resolutions and decisions of regional political and quasi-judicial bodies remains a major handicap for the legal protection mechanism'. [176] Indeed, the number of refugees in Africa is high, refugees' predicament is protracted and violations of refugees' rights abound.[177] Thus it may be a question of quantity over quality and rhetoric over reality: while there is no shortage of OAU and AU refugee bodies and initiatives, it is not clear that they have prevented displacement or produced better outcomes for refugees.

The transition from the OAU to the AU represented a significant opportunity to change this. While 'non-interference by any Member State in the internal affairs of another'[178] remains an AU principle, the new continental body is not as strictly bound by the provision as was the OAU.[179] Rather, in the AU there is the right 'to intervene

[176] Nyanduga (n 3) 102.

[177] See, for example, Jeff Crisp, 'No Solution in Sight: The Problem of Protracted Refugee Situations in Africa', in Itaru Ohta and Yntiso Gebre (eds), *Displacement Risks in Africa: Refugees, Resettlers and Their Host Population* (Kyoto University Press 2005); Rutinwa (n 13); Guglielmo Verdirame and Barbara Harrell-Bond, *Rights in Exile: Janus Faced Humanitarianism* (Berghahn Books 2005).

[178] AU Constitutive Act (n 106) art 4(g).

[179] Charter of the Organization of African Unity (25 May 1963) 479 UNTS 39, art III(2).

in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity',[180] which have caused of some of the continent's worst refugee crises. Moreover, the AU's focus on democracy, social and economic development, peace and security and human rights is more in line with refugee protection than was its predecessor's preoccupation with decolonisation and the consolidation of the post-colonial state. Finally, the establishment of the AU was a fortuitous moment for institution building. Indeed, the AU established a trio of bodies focused at least in part on refugee protection, with neatly parsed out political, advisory and technical mandates.

Yet while there are three AU organs for refugee protection, control is ultimately concentrated in a small division of technocrats. Moreover, the standards and initiatives emanating from HARDP, though they may percolate up through the levels of the AU and result in high-level decisions and resolutions, are rarely if ever effectively implemented by member states, as evidenced by the scale of the refugee problem in Africa and the dire conditions in which refugees live. The AU's legal foundations permit high expectations in the field of refugee protection and the number of and conditions for refugees in Africa demand them. It is time for the AU to rehabilitate its moribund refugee-focused institutions and for all of them—the PRC Sub-Committee, CCAPRRI and HARDP—to focus on the quality of initiatives over their quantity. Equally, it is time for member states to actually implement AU directives; part of the responsibility for ensuring this rests with the AU itself. Moreover, the AU must ensure that the important attention it is paying to IDPs, returnees and humanitarian affairs generally does not come at the expense of

[180] AU Constitutive Act (n 106) art 4(h).

refugees' specific needs. Finally, and perhaps most importantly, however refugee protection is framed, the AU must ensure that its refugee protection activities are effective.

The AU is not alone in facing a problem of effectiveness; the African Commission also has a robust record of engagement with refugee protection and similarly equivocal results. It and other African judicial institutions with a human rights mandate are the subject of the next chapter.

CHAPTER 7

THE AFRICAN COMMISSION AND THE AFRICAN HUMAN RIGHTS COURTS IN REFUGEE PROTECTION

A. INTRODUCTION

The institutional architecture for refugee protection in Africa consists of organisations with political, advisory and technical mandates, which were the subject of the preceding chapter, as well as judicial bodies. This chapter focuses on how judicial institutions with a human rights mandate have engaged with refugee protection. Four institutions are relevant in this regard: the African Commission, the Interim Court, the Merged Court and the New Merged Court. They are previewed in this introduction, with the remainder of the chapter devoted to addressing each body and its refugee protection role in more depth. The African Commission's promotional and protective mandates and its refugee protection role are the focus of section B. Section C is devoted to the Interim Court and its engagement with refugee protection, while section D covers the Merged Court and the New Merged Court. A final section concludes.

The African Commission is a supervisory treaty body created by the African Charter.[1] It began operating in 1987. The African Commission's decisions in individual and inter-state complaints are widely viewed as not being legally binding, a problem the Interim Court was created in part to address. The Interim Court was

[1] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58.

created by way of a 1998 protocol to the African Charter[2] (the Interim Court Protocol) and became operational in June 2006, when its first cohort of judges was sworn in.

Between the 1998 adoption of the Interim Court Protocol and the Court's operationalisation in 2006, AHG Chairperson and Nigerian President Olusegun Obasanjo revived a dormant idea to merge the Interim Court with the African Court of Justice, in order to save on costs and rationalise pan-African institutions.[3] The African Court of Justice was to be the AU's principal judicial organ, mandated to address issues related to the application or implementation of the AU's Constitutive Act. At the time of Obasanjo's proposal, a Protocol establishing the African Court of Justice had been adopted but had not yet entered into force.[4] The AHG adopted Obasanjo's suggestion in July 2004,[5] which prevented the AU Court of Justice from ever being established, despite the formal entry into force of its establishing protocol on 11 February 2009. A protocol establishing the Merged Court, with the Merged Court's statute annexed to it, was adopted in 2008 (the Merged Court Protocol).[6]

[2] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004) OAU Doc. OAU/LEG/EXP/AFCHPR/PROT.

[3] Sonia Sceats, *Africa's New Human Rights Court: Whistling in the Wind?* (Chatham House, 2009) 5.

[4] Protocol of the Court of Justice of the African Union (adopted 11 July 2003, entered into force 11 February 2009).

[5] AU (AHG), 'Decision on the Seats of the African Union' (AU Addis Ababa 6-8 July 2004) Assembly/AU/Dec.45 (III) Rev. 1, para 4.

[6] Protocol on the Statute of the African Court of Justice and Human Rights (adopted 1 July 2008) AU Doc. Assembly/AU/Dec.196 (XI).

As of February 2014, five states had ratified the Merged Court Protocol,[7] ten ratifications short of the fifteen required for entry into force.[8] The Merged Court Protocol will not, however, ever enter into force in its original form. In June 2014, the Merged Court Protocol was amended by way of a further protocol (the New Merged Court Protocol),[9] which created the New Merged Court. The New Merged Court is substantially the same as the Merged Court, except its jurisdiction covers international crimes[10] (sitting heads of state were controversially exempted from this jurisdiction).[11] The New Merged Court Protocol has yet to enter into force.

B. THE AFRICAN COMMISSION

Despite this panoply of new human rights courts, much of the general and refugee-related human rights work in Africa is ironically still performed by the African Commission, the failings and supposed quasi-judicial character of which the new courts were created in part to address. The African Commission was created by article 30 of the African Charter to 'promote human and peoples' rights and ensure their protection in Africa'. The African Commission thus has a dual promotional and protective mandate. The latter consists mainly of the consideration of individual complaints, known as 'communications', while the former consists primarily of the examination of state party reports.

[7] Benin, Burkina Faso, the Republic of Congo, Libya and Mali.

[8] Merged Court Protocol (n 6) art 9(1).

[9] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (adopted 27 June 2014).

[10] ibid art 3(1).

[11] ibid art 46A *bis*.

Article 60 of the African Charter articulates the African Commission's sources of law. It provides that the African Commission

> shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on Human and Peoples' Rights, the Charter of the United Nations, the Charter of the Organisation [*sic*] of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of Human and Peoples' Rights, as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the Parties to the present Charter are members.

Additionally, according to article 61, the African Commission shall

> take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognised by Member States of the Organisation [*sic*] of African Unity, African practices consistent with international norms on Human and Peoples' Rights, customs generally accepted as law, general principles of law recognised by African States as well as legal precedents and doctrine.

Viljoen explains that these two provisions made their way into the African Charter by way of the Monrovia Proposal, which, as explained in chapter 5, was a blueprint for the establishment of an African human rights body. The Monrovia Proposal included this range of international human rights sources 'to ensure that the proposed Commission would have a substantive basis on which to operate, *in the absence of any African human rights convention or charter*'.[12] Although the African Charter ultimately included substantive rights and duties, articles 60 and 61 were nevertheless retained.[13] The African Commission may thus draw on African and international human rights treaties—including the 1969 Convention—customary international law,

[12] Frans Viljoen, *International Human Rights Law in Africa* (2nd edn, OUP 2012) 325.

[13] ibid.

jurisprudence, doctrine and general principles of law. In practice, however, the African Commission primarily applies the African Charter.

The African Commission's functioning is regulated by its Rules of Procedure, which were first adopted in 1988[14] and then amended in 1995. New Rules of Procedure, which currently govern the African Commission, were adopted in 2010.[15] The African Commission is comprised of 11 commissioners, who are elected by the AHG to serve part-time in a personal capacity.[16] They meet twice per year for 10 to 15 days, usually at the African Commission's seat in Banjul, Gambia, where there is also a small Commission secretariat.[17]

Despite the distance between Banjul and Addis Ababa, where the AU is headquartered, the African Commission was created 'within the Organisation of African Unity' [18] and must 'co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights',[19] which would today include the AU generally and several of its organs in particular. The precise nature of the relationship between the African Commission and the AU is not, however, clearly articulated anywhere. While the African Charter established the African Commission 'within' the OAU, according to the French

[14] Reproduced in Rachel Murray and Malcolm Evans (eds), *Documents of the African Commission on Human and Peoples' Rights*, vol 1 (Hart 2001) 136–64.

[15] Reproduced in Christof Heyns (ed) *Human Rights Law in Africa*, vol 1 (Brill 1996) 540–56.

[16] African Charter (n 1) arts 31 & 33.

[17] Viljoen (n 12) 293.

[18] African Charter (n 1) art 30.

[19] ibid art 45(1)(c).

language version of the Charter, the African Commission was established '*auprès*', or 'close to', the OAU.[20] When the AU supplanted the OAU, the heads of state and government decided that the African Commission would 'henceforth operate within the framework of'[21] the AU, a similarly imprecise formulation. At the very least, what is clear is that the African Commission is not an AU organ; rather, it is 'an institutional organ of an autonomous treaty regime'.[22] In the absence of a clear hierarchy among the African Commission and AU organs with overlapping mandates, 'the resolution and governance of the resulting diversification of institutional responsibilities pertaining to the African Charter must be left to a study of the practices and decisions of these institutions'.[23] Viljoen has concluded that the African Commission is isolated from the rest of the AU.[24]

1. Promotional mandate

The African Commission's promotional functions are non-adversarial public activities entailing education about, and the creation of a culture of respect for, human rights. A principal activity in this regard is addressing state reports. Human rights treaties generally require states parties to submit periodic reports to the relevant treaty monitoring body, with a view to it assessing the extent to which states have adhered

[20] ibid.

[21] AU (AHG), 'Decision on the Interim Period' (AU Durban 9–10 July 2002) ASS/AU/Dec.1-8(I) para 2.

[22] Chidi Odinkalu, 'From Architecture to Geometry: The Relationship Between the African Commission on Human and Peoples' Rights and Organs of the African Union' (2013) 35 Hum Rts Q 850, 852.

[23] ibid 856.

[24] Viljoen (n 12) 169.

to their obligation to give effect to the treaty in question. The African Charter is no exception. Its article 62 requires each state party to submit biennial reports on legislative or other measures taken to give effect to the rights and freedoms guaranteed under the Charter. Interestingly, however, the consideration of state party reports is not mentioned by the African Charter's article 45, which lists the African Commission's functions. Moreover, article 62 does not specify the body to which reports should be submitted. In 1988, the African Commission requested a mandate to examine state reports, which was granted by the OAU Assembly based on the power implied by article 62.[25] Soon thereafter, the African Commission adopted guidelines on state reporting; in 1998 these were amended and also supplemented by a more concise set of additional guidelines.[26]

Broadly speaking, the guidelines require reports to be publicly examined, and then commented upon, by the African Commission. Despite the fact that state reporting forms the 'backbone' of the African Commission's mission,[27] reports are very often overdue, as is their consideration by the Commission.[28] For example, after the African Commission's 24th session, 258 state reports were due, however only 30 had actually been submitted and only 25 had been examined;[29] as of 2012, no state

[25] ibid 356.

[26] Christof Heyns, 'The African Regional Human Rights System: The African Charter' (2003-2004) 108 Penn State L Rev 679, 682; the guidelines are reprinted in Christof Heyns, *Human Rights Law in Africa*, vol 3 (Brill 1998) 125.

[27] Viljoen (n 12) 349.

[28] Christof Heyns and Frans Viljoen, 'An Overview of International Human Rights Protection in Africa' (1999) 15 S Afr J Hum Rts 421, 430.

[29] ibid.

had ever met the article 62 requirement to report every two years.[30] In this context, promotional activities that do not depend on regular state participation assume increased importance. These include issuing resolutions;[31] undertaking fact-finding missions; disseminating information; convening seminars, symposia and conferences; and creating subsidiary bodies such as special rapporteurs, working groups and committees.[32]

2. Protective mandate

The African Commission discharges its protective mandate primarily by hearing oral arguments and issuing findings in adversarial proceedings regarding alleged Charter violations. Communications may be instituted by one state party to the Charter against another,[33] or by an individual or a legal person (such as an NGO) against a state party. Like state party reports, however, the African Charter provides no explicit legal basis for individual complaints; the consideration of individual communications is not explicitly provided for by article 45 on the African Commission's mandate. Moreover, article 58 provides,

> 1. When it appears after deliberations of the Commission that one or more Communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases.
> 2. The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its finding and recommendations.

[30] Viljoen (n 12) 355.

[31] African Charter (n 1) art 45(1)(b).

[32] ibid art 45(1)(a).

[33] ibid arts 47–59.

The AHG has never responded to this procedure, so the African Commission no longer pursues it.[34] Nevertheless, it has been read as indicating that the African Commission may only consider communications regarding 'serious or massive violations' and further to instructions from the AHG.[35] Drawing on the language of article 55, which refers to communications 'other than those of State Parties', the African Commission has always, however, interpreted its mandate as including the power to consider communications authored by individuals or legal persons.[36]

Before the African Commission will consider a communication on its merits, the author's standing must be established, followed by the communication's admissibility. States parties to the African Charter have automatic standing. Individual complainants are, however, subject to a victim requirement.[37] Legal persons have standing to submit communications on behalf of alleged victims if the victim is 'unable to submit the communication' him or herself;[38] the legal person need not have the victim's express consent, nor must it have observer status before the African Commission.[39]

Admissibility is assessed after the threshold requirement of standing. The admissibility criteria are set out at article 56 of the Charter. Communications may not

[34] Heyns (n 26) 695.

[35] ibid 694.

[36] ibid.

[37] Viljoen (n 12) 304.

[38] 1988 Rules of Procedure (n 14) r 114(1)(a).

[39] Viljoen (n 12) 304.

be submitted anonymously,[40] use 'disparaging or insulting language',[41] be based solely on information disseminated by mass media[42] and may not deal with issues already settled in another forum.[43] With several exceptions,[44] communications may only be submitted after, and within a reasonable period of time from,[45] the exhaustion of domestic remedies.[46] The Charter is silent on the issue of whether a complainant who has fled the respondent state must nevertheless meet the article 56(5) exhaustion of domestic remedies admissibility requirement. Bekker reviewed the jurisprudence in this regard, finding it inconsistent. She explains that a distinction, however, 'appears to be drawn between cases where an individual filing an application has been granted refugee status and those where the complainant is merely an asylum seeker'.[47] In the latter case, the African Commission appears reluctant to view the exhaustion of domestic remedies constructively.[48] Finally, communications must be 'compatible with' the OAU (now AU) Charter, or with the African Charter.[49]

The admissibility criterion requiring 'compatibility with' the AU and African Charters relates to the rights-holder(s), the duty-bearer(s), the time and place at which

[40] African Charter (n 1) art 56(1).

[41] ibid art 56(3).

[42] ibid art 56(4).

[43] ibid art 56(7).

[44] See Viljoen (n 12) 316–9.

[45] African Charter (n 1) art 56(6).

[46] ibid art 56(5).

[47] Gina Bekker, 'The Protection of Asylum Seekers and Refugees within the African Regional Human Rights System' (2013) 13 Afr Hum Rts LJ 1, 10.

[48] ibid.

[49] African Charter (n 1) art 56(2).

the violation is alleged to have occurred and the substantive issues involved.[50] Thus the author must be someone protected by the Charter (or be a legal person representing the interests of a protected individual), the respondent state must be bound by the Charter, the violation must have occurred after the Charter's entry into force for the respondent state and the right or rights violated must be 'located within the Charter'.[51] The latter does not, however, require that the communication invoke a particular Charter right. According to Viljoen, the 'located within the Charter' admissibility requirement allows scope for the African Commission to consider alleged violations of any AU human rights treaty without an autonomous treaty monitoring body, such as the 1969 Convention: 'it is both logical and necessary for the African Commission to be a forum where alleged violations of these treaties may be considered'.[52] Indeed, in *African Institute*, the African Commission found that the mass expulsion of refugees violated the 1969 Convention's article IV non-discrimination provision,[53] even though neither party had raised the refugee instrument.[54]

The African Commission's willingness to pronounce upon human rights treaties other than the African Charter reflects its innovative approach in both substantive and procedural matters. In the latter connection, the African Commission's Rules of Procedure provide for the individual complaints procedure

[50] Viljoen (n 12) 311.

[51] ibid 312.

[52] ibid.

[53] *African Institute for Human Rights and Development (on Behalf of Sierra Leonean Refugees in Guinea) v Guinea* comm no 249/2002, 20th Annual Activity Report of the Af Cm HPR (2004) (African Institute) para 74.

[54] Viljoen (n 12) 312.

described above, despite the Charter's silence in this regard. In a substantive sense, African Commission resolutions and decisions have 'provided clarity about vaguely formulated rights and expanded the normative scope of the Charter'.[55] This has been within a largely textual interpretive approach, balanced by recognition of the importance of giving effect to rights.[56]

This recognition is but one aspect of whether rights are realised. Equally important are remedies, their legal status and whether they are implemented. The Charter is silent regarding remedies, noting only that the African Commission may make 'recommendations' to the AHG (rather than to the respondent state).[57] This has led to the widely held, and at the very least arguable,[58] view that African Commission decisions are not binding,[59] and resulted in early jurisprudence that found violations without providing an associated remedy.[60] Eventually, however, the African Commission began to order both open-ended and specific remedies.[61] Open-ended remedies admonish the state to bring its laws into line with the Charter.[62] Specific remedies are those that prescribe either administrative or legislative measures to

[55] ibid 323.

[56] ibid 323–4.

[57] African Charter (n 1) art 53.

[58] See Frans Viljoen and Lirette Louw, 'The Status of the Findings of the African Commission: From Moral Persuasion to Legal Obligation' (2004) 48 J Afr L 1, 13–8.

[59] See, for example, Rose D'Sa, 'Human and Peoples Rights: Distinctive Features of the African Charter' (1985) 29 J Afr L 72, 79–80.

[60] Viljoen (n 12) 337.

[61] ibid.

[62] ibid.

correct violations or those that order the payment of compensation.[63] Viljoen argues that states should not be able to opt out of such orders, and views the issue of whether African Commission decisions are binding as somewhat of a red herring: the 'contention is … not so much that the Commission's findings should be characterized as "binding", but rather that states are treaty-bound to give effect to the Charter as interpreted by the treaty body in individual cases'.[64]

The implementation record of African Commission decisions, however, unfortunately suggests that states do not share this view. In their seminal study of state compliance with the 44 African Commission decisions issued between 1994 and 2004, Viljoen and Louw found full compliance in only 14 per cent of cases.[65] In 30 per cent of cases, the respondent state did not comply with the African Commission's decision, and 32 per cent of cases featured partial compliance.[66] In the remaining nine per cent of cases, it was unclear whether compliance had occurred.[67] This poor record should be borne in mind in relation to the African Commission's refugee protection engagement, to which we now turn.

3. Engagement with refugee protection

The African Commission's promotional and protective engagement with refugee issues began in the 1990s, when the African Commission held its first refugee-related

[63] ibid.

[64] ibid 339.

[65] Viljoen and Louw (n 58) 5.

[66] ibid 5–6.

[67] ibid 7.

event and heard its first refugee-focused case.[68] Since then, refugee protection has risen steadily in prominence on the African Commission's agenda. How the African Commission has addressed refugee protection within each of its mandates is addressed below.

(a) Refugees within the promotional mandate

One of the earliest examples of the African Commission's promotional engagement with refugees was the appearance of the issue on the agenda of its eighth ordinary session in 1990.[69] Four years later, in February 1994, the African Commission co-hosted, with the Southern African Centre for Research and Documentation, a Harare seminar titled 'African Refugees and Internally Displaced Persons'.[70] It concluded that the 'plight of African refugees and internally displaced persons is a flagrant violation of human dignity and basic human rights'.[71] However, beyond highlighting refugees as a vulnerable group in need of special protection, little came of the seminar; African Commission engagement with refugee protection did not commence in earnest until the body began collaborating with UNHCR.[72]

[68] *Organisation mondiale contre la torture et al v Rwanda* comm nos 27/89, 46/91, 49/91 and 99/93, 10th Annual Activity Report of the Af Cm HPR (1996) (OMT).

[69] Rachel Murray, 'Refugees and Internally Displaced Persons and Human Rights: the African System' (2005) 24 RSQ 56, 58.

[70] ibid; the conference's recommendations are attached to the African Commission's 7th Annual Activity Report.

[71] Cited in Bekker (n 47) 20–1.

[72] Bekker (n 47) 21.

An early example of collaboration between the African Commission and UNHCR was a December 1998 workshop of the two organisations in Dakar, Senegal.[73] The following year, UNHCR attended the African Commission's 26th ordinary session in Kigali, Rwanda, where discussions were held about cooperation between the two bodies.[74] Then in March 2000, UNHCR and the OAU co-organised a Conakry meeting of government and non-governmental experts, convened on the occasion of the thirtieth anniversary of the adoption of the 1969 Convention.[75] The meeting resulted in a Comprehensive Action Plan.[76] Among the Plan's recommendations was the suggestion that UNHCR and the African Commission conclude an agreement aimed at strengthening the African Commission's monitoring capacity and programme of work regarding the human rights of refugees and asylum seekers.[77]

Further discussions were held on 20 and 21 March 2003 at an Addis Ababa meeting of UNHCR and the African Commission. This meeting concluded that

> refugees are endowed with the same rights and responsibilities as all other human beings. The specific rights of refugees are an integral part of human rights and are universal, indivisible, inter-dependent and inter-related. Where national laws on refugees are inadequate or non-existent, general human rights law should therefore be invoked to protect refugees.[78]

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[73] Rachel Murray, *Human Rights in Africa: From the OAU to the African Union* (CUP 2004) 194.

[74] Murray (n 69) 61.

[75] See chapter 6, section B.2.

[76] OAU and UNHCR, 'Comprehensive Action Plan adopted by the Special OAU/UNHCR Meeting of Government and Non-Government Technical Experts on the Thirtieth Anniversary of the 1969 OAU Refugee Convention' (OAU & UNHCR Conakry 27-29 March 2000) CONFP/OAU30th/CORE/4-Rev1.

[77] ibid.

[78] Cited in Murray (n 73) 194.

The Addis Ababa meeting also recommended that the African Commission should become a member of the AU's CCAPRRI[79]—discussed in chapter 6—and, importantly, that the African Commission should monitor the implementation of the 1969 Convention.[80] Just two months later, an expert report emanating from the AU's First Ministerial Meeting on Human Rights, held in Kigali on 5 and 6 May 2003, identified the African Commission as having oversight of the 1969 Convention.[81]

A Memorandum of Understanding between the African Commission and UNHCR was signed on 26 May 2003 during the African Commission's 33rd ordinary session in Niamey, Niger;[82] its imminent signature had been 'welcomed' by the ministerial meeting's Kigali Declaration.[83] The Memorandum identifies several areas of cooperation, including: information sharing; joint dissemination of and the provision of training in international human rights, refugee and humanitarian law; joint research and publication; joint action to implement African Commission resolutions on refugees; the promotion of closer cooperation between UNHCR, the African Commission and the AU; and the promotion of communication between UNHCR and the African Commission.[84] The Memorandum also provides that both

[79] Murray (n 73) 195.

[80] ibid 194.

[81] OAU, 'Report of the Meeting of Experts of the First AU Ministerial Confernece on Human Rights in Africa' (OAU Kigali 5-6 May 2003) EXP/CONF/HRA/RPT (II) para 40(2), cited in Murray (n 69) 62.

[82] Amanda Lloyd and Rachel Murray, 'Institutions with Responsibility for Human Rights Protection under the African Union' (2004) 48 J Afr L 165, 174.

[83] OAU, 'Kigali Declaration of the First AU Ministerial Conference on Human Rights in Africa' (OAU Kigali 8 May 2003) MIN/CONF/HRA/Decl1 (I) para 15.

[84] African Commission and UNHCR, 'Memorandum of Understanding Between the African Commission on Human and Peoples' Rights and the United Nations High Commissioner for Refugees' (26 May 2003) <http://www.africa-union.org/Structure_of_the_Commission/Political%20Affairs/x/achpr-unhcr%20agreement,%20english.pdf> accessed 15 October 2011, art 2.

organisations should draw inspiration from UN treaty monitoring and Charter-based bodies, UNHCR's ExCom and relevant AU organs.[85] According to Naldi and D'Orsi, while on paper the relationship between UNHCR and the African Commission 'looks like it goes a long way in helping to promote and protect asylum seekers and refugees', in fact 'there has been little cooperation between the two and a lack of undertaking in the areas of cooperation'.[86] Bekker agrees, arguing ten years after the Memorandum was concluded that 'little progress has been achieved'.[87]

When questioned about the current status of the Memorandum of Understanding between the African Commission and UNHCR, Maya Sahli Fadel—a Commissioner of the African Commission and its Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa—indicated that UNHCR and the Commission have been working together towards the adoption of a protocol to the African Charter on the right to nationality in Africa, and that in the near future the organisations will collaborate in relation to IDPs.[88] As explained above, the Comprehensive Action Plan adopted in 2000 recommended cooperation between the African Commission and UNHCR in order to strengthen the Commission's capacity in relation to refugees' and asylum seekers' human rights.[89] It

[85] ibid.

[86] Gino J. Naldi and Cristiano D'Orsi, 'The Role of the African Human Rights System with Reference to Asylum Seekers' in Ademola Abass and Francesca Ippolito (eds), *Regional Approaches to the Protection of Asylum Seekers: An International Legal Perspective* (Ashgate 2014) 41.

[87] Bekker (n 47) 21.

[88] Interview with Commissioner Maya Sahli Fadel, Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa, African Commission, 12 August 2015, Geneva.

[89] OAU and UNHCR (n 76).

seems that today, collaboration between the two organisations is focused on other issues, likely at the expense of the original intent behind their partnership.

While the Conakry recommendation that the African Commission should conclude an agreement with UNHCR came to fruition, there were no further developments regarding the 2003 Addis Ababa recommendation, and the 2003 Kigali designation, regarding African Commission oversight of the 1969 Convention. Several authors have identified the African Commission as having supervisory authority over the 1969 Convention. Naldi and D'Orsi note that while there 'was originally no regional mechanism tasked with implementation and enforcement … this has changed with the … [African Commission] mandate being extended to cover the 1969 OAU Convention'.[90] Van Garderen and Ebenstein similarly describe the AU as having 'mandated the … African Commission to enforce the OAU Refugee Convention'.[91] These statements do not, however, reflect actual African Commission activities regarding the 1969 Convention. Only one African Commission decision has pronounced upon the instrument,[92] and this was likely pursuant to articles 56(2) and 60 of the African Charter rather than because of any supervisory authority.[93] Indeed, Commissioner Fadel indicated that the Commission's jurisdiction over the 1969 Convention flows from article 12(3) and article 60 of the African Charter, rather than

[90] Naldi and D'Orsi (n 86) 26.

[91] Jacob van Garderen and Julie Ebenstein, 'Regional Developments: Africa' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (OUP 2011) 201.

[92] African Institute (n 53).

[93] As a reminder, article 60 of the African Charter allows the African Commission to 'draw inspiration from international law on human and peoples' rights', while, according to Viljoen, the Charter's article 56(2) admissibility requirement allows the Commission to consider alleged violations of any AU human rights treaty without an autonomous treaty monitoring body ((n 12) 312).

from any supervisory authority.[94] The AU designating the African Commission as having oversight of the 1969 Convention is meaningless in the absence of formal activity in this regard. Thus while the African Commission can issue findings in relation to the 1969 Convention, in practice the treaty remains without any formal oversight.

The African Commission appointed Tanzanian Commissioner Bahame Tom Nyanduga as its Focal Point on Refugees and Displaced Persons in Africa at its 34th ordinary session in November 2003, just six months after the ministerial meeting in Kigali had identified the African Commission as overseer of the 1969 Convention. According to Viljoen, this thematic approach goes beyond the Commission's explicit mandate.[95] The Focal Point role was upgraded the following year during the African Commission's 36th ordinary session, when Nyanduga was appointed as the first Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons in Africa.[96] As mentioned above, the current—and fourth—Special Rapporteur is Algerian Commissioner Maya Sahli Fadel. While the appointment of a Focal Point on refugees may certainly have been related to the AU's designation of the African Commission as having oversight of the 1969 Convention, the mere existence of Focal Point or Special Rapporteur on refugees is not in itself sufficient to discharge the full responsibility of supervising the 1969 Convention, especially when one considers the

[94] Fadel interview (n 88); article 12(3) relates to the right to seek and obtain asylum.

[95] Viljoen (n 12) 297; see, also, Julia Harrington, 'Special Rapporteurs of the African Commission on Human and Peoples' Rights' (2001) 1 Afr Hum Rts LJ 247, 249–54.

[96] African Commission, 'Resolution on the Mandate of the Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons in Africa' (36th Ordinary Session, 23 November–7 December 2004); for a detailed account of Nyanduga's activities as Special Rapporteur, see Jamil Ddamulira Mujuzi, 'The African Commission on Human and Peoples' Rights and the Promotion and Protection of Refugees' Rights' (2009) 9 Afr Hum Rts LJ 160, 168–71.

Special Rapporteur's mandate. It is broader and more general than typical supervisory functions, and moreover the responsibilities are located in one individual, who serves part-time and in a personal capacity.

> The Special Rapporteur has a mandate to
>
> a. seek, receive, examine and act upon information on the situation of refugees, asylum seekers and internally displaced persons in Africa;
> b. undertake studies, research and other related activities to examine appropriate ways to enhance the protection of refugees, asylum seekers and internally displaced persons in Africa;
> c. undertake fact-finding missions, investigations, visits and other appropriate activities to refugee camps and camps for internally displaced persons;
> d. assist Member States of the African Union to develop appropriate policies, regulations and laws for the effective protection of refugees, asylum seekers and internally displaced persons in Africa;
> e. cooperate and engage in dialogue with Member States, National Human Rights Institutions, relevant intergovernmental and non governmental bodies, international and regional mechanisms involved in the promotion and protection of the rights of refugees, asylum seekers and internally displaced persons;
> f. develop and recommend effective strategies to better protect the rights of refugees, asylum seekers and internally displaced persons in Africa and to follow up on his recommendations;
> g. raise awareness and promote the implementation of the UN Convention on Refugees of 1951 as well as the 1969 OAU Convention Governing the Specific Aspects of Refugees Problems in Africa;
> h. submit reports at every ordinary session of the African Commission on the situation of refugees, asylum seekers and internally displaced persons in Africa.[97]

The Special Rapporteur's mandate was extended at the African Commission's 39th ordinary session in May 2006 to include migration issues.[98]

Among its activities, which have been limited by budgetary constraints,[99] the Special Rapporteur undertook fact-finding missions to Senegal to investigate the

[97] African Commission (n 96) para 1.

[98] Chaloka Beyani, 'Recent Developments in the African Human Rights System 2004-2006' (2007) 7 Hum Rts L Rev 582, 588–9.

situation of Mauritanian refugees and to Zimbabwe following the government's eviction operation Murambatsvina, and took part in an AU humanitarian and security assessment mission to Darfur, Sudan.[100] Special Rapporteurs have also issued press statements regarding particular violations, written to governments and participated in relevant seminars and conferences.[101] Regarding standard setting, the first Special Rapporteur contributed to the adoption of the Kampala Convention.[102] More recently, the current Special Rapporteur is playing a major role in the effort to adopt a protocol to the African Charter on the right to a nationality in Africa. In this connection, she authored a major study[103] and is leading the charge to draft the proposed nationality protocol.[104] Indeed, Commissioner Fadel explained that the vast majority of the time she spends on her Special Rapporteur mandate is devoted to her statelessness work.[105]

Overall, the Special Rapporteur 'has more of an awareness-raising and engagement role than actual powers to address protection issues',[106] which led Naldi and D'Orsi to conclude that the office is of limited effect.[107] The same authors call for a rethink of the Special Rapporteur's role, in particular for it to include increased

[99] Bekker (n 47) 24.

[100] Viljoen (n 12) 376.

[101] Bekker (n 47) 24.

[102] Viljoen (n 12) 376.

[103] African Commission on Human and Peoples' Rights, 'The Right to a Nationality in Africa' (2014) <http://www.achpr.org/files/special-mechanisms/refugees-and-internally-displaced-persons/the_right_to_nationality_in_africa.pdf> accessed 28 April 2015.

[104] African Commission, 'Resolution on the Drafting of a Protocol to the African Charter on Human and Peoples' Rights on the Right to a Nationality in Africa' (55th Ordinary Session, 28 April–12 May 2014).

[105] Fadel interview (n 88).

[106] Naldi and D'Orsi (n 86) 40.

[107] ibid.

collaboration with UNHCR.[108] Viljoen criticises the Special Rapporteur role in more general terms, noting that as the Commission's special mechanisms have proliferated, it has 'gradually started to neglect its core protective function by finalizing fewer and fewer communications at its sessions. … Time, energy, and resources devoted to these mechanisms have detracted from the Commission's core protective function'.[109]

Despite these critiques—and perhaps not surprisingly given his previous role—former Special Rapporteur Nyanduga maintains that 'the continued use of the African Commission as a forum for discussion of refugee rights issues is an important protection mechanism for refugees'.[110] The current Special Rapporteur echoed this view, stressing that much important discussion about refugee rights happens on the side-lines of Commission sessions further to state reports, and during her field missions to states.[111] Her descriptions of this informal diplomatic work and of her role more generally gave the impression of an impassioned advocate doing her utmost for refugees in a difficult context: a continent on which most states have difficulty securing human rights even for their own citizens.[112] Much of this engagement is by its very nature invisible to academic observers, however this should not be taken to imply that it is of no or limited effect. Certainly the presence within the African Commission of a committed Commissioner with a mandate dedicated to refugees and related issues must have some impact on refugee protection.

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[108] ibid.

[109] Viljoen (n 12) 296–7.

[110] Bahame Tom Mukirya Nyanduga, 'Refugee Protection Under the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa' (2004) 47 German YB Intl L 85, 103.

[111] Fadel interview (n 88).

[112] ibid.

Beginning in 1990, and with increasing frequency since the Special Rapporteur's appointment, the African Commission has raised refugee issues during several of its missions,[113] and has adopted numerous country-specific and thematic resolutions relating to refugees.[114] However, in the absence of a mechanism to follow up on such resolutions, Bekker argues that they have been of little practical effect.[115] The effectiveness of the African Commission's refugee work within the state reporting procedure has been similarly limited. Bekker describes the range of African Commission recommendations and concluding observations relating to refugees,[116] but notes that poor state compliance with reporting obligations and the lack of publicity for, and follow up on, such recommendations and observations has hampered their effectiveness.[117] It is worth noting in this regard, however, that according to Commissioner Fadel, much valuable discussion occurs outside such official reporting.[118]

The Commission's promotional work in favour of refugees is largely divorced from AU efforts in this regard.[119] The African Commission has largely failed to collaborate with the AU refugee protection entities detailed in the preceding chapter.

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[113] For an account of refugee issues raised during fact-finding and promotional missions, see Mujuzi (n 96) 171–3.

[114] Bekker (n 47) 21; for a list of African Commission resolutions relating to refugees, see Bekker (n 47) 21 and Mujuzi (n 96) 173–4.

[115] Bekker (n 47) 21.

[116] ibid 21–3.

[117] ibid 23–4.

[118] Fadel interview (n 88).

[119] See, generally, Curtis Doebbler, 'Complex Ambiguity: The Relationship between the African Comission on Human and Peoples' Rights and Other African Union Initiatives Affecting Respect for Human Rights ' (2003) 13 Transnat'l L & Contemp Probs 7.

When the African Commission began to engage with refugee protection, the 'OAU's Refugee Division was suggested as a possible partner, but the African Commission chose to determine its own procedures first before collaborating with the Division'.[120] This marked the beginning of a pattern. For a long time 'the OAU/AU organs and the African Commission … seemed to operate, in this [refugee] area as well as many others, in splendid isolation. Neither referred to each others' documents or jurisprudence in their own work or drew upon each other to enforce decisions or recommendations'.[121] This is not to say that the African Commission and the AU have never worked together. In November 2002, the African Commission and HARDP co-hosted the 'Conference on Refugee Protection in Africa: How to Ensure Security and Development for Refugees and Local Hosts'.[122] One joint event, however, hardly constitutes evidence of fruitful collaboration.

The fragmented refugee protection initiatives established within the African Commission's promotional mandate have been met with limited success. Its cooperation with UNHCR has lately been limited to discrete issues such as statelessness, while the Commission's collaboration with the AU has been largely non-existent. In this context, the African Commission's protective mandate assumes increased importance as a source of refugee protection. The African Commission has issued several decisions in cases brought by or on behalf of refugees, to which we now turn.

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[120] Rachel Murray, 'The African Charter on Human and Peoples' Rights 1987-2000: An Overview of its Progress and Problems' (2001) 1 Afr Hum Rts LJ 1, 16; 'Refugee Division' presumably refers to the Bureau for Refugees, Displaced Persons and Humanitarian Assistance, discussed in chapter 6.

[121] Murray (n 69) 61; see, also, Viljoen (n 12) 297.

[122] Lloyd and Murray (n 82) 174.

(b) Refugees within the protective mandate

Refugee cases declared admissible[123] can be classified as flowing from expulsion and deportation on the one hand or repatriation and return on the other. First among the expulsion and deportation line of cases was *OMT*, which concerned the expulsion of four Burundian refugees from Rwanda on ostensible security grounds.[124] This was found to have violated the rights to non-discrimination (article 2), liberty and security of the person (article 6), the right to have one's cause heard (article 7), including the right to asylum (article 12(3)) and the protection from expulsion without due process of law (article 12(4)), as well as the prohibition against the collective expulsion of non-nationals (article 12(5)).[125] Similarly, *RADDHO* related to the deportation of 517 West Africans (who were not all necessarily refugees) from Zambia, following a period of detention. The African Commission found violations of the rights to non-discrimination (article 2), the right to have one's cause heard (article 7) and the prohibition of the mass expulsion of non-nationals (article 12(5)).[126] *Union interafricaine des droits de l'homme* concerned the mass expulsion of West Africans (not all of whom were necessarily refugees) from Angola, which the African Commission found violated the rights to non-discrimination (article 2), the right to have one's cause heard (article 7), the right to property (article 14), the right to family

[123] A number of cases brought by or on behalf of refugees have been found inadmissible: *Mouvement des réfugiés mauritaniens au Senegal v Senegal* comm no 162/97, 22nd Ordinary Session of the Af Cm HPR (1997); *Institute for Human Rights and Development in Africa (on behalf of Jean Simbarakiye) v the Democratic Republic of Congo* comm no 247/02, 33rd Ordinary Session of the Af Cm HPR (2003); *Mouvement des réfugiés mauritaniens au Senegal v Senegal* comm no 254/02, 33rd Ordinary Session of the Af Cm HPR (2003).

[124] OMT (n 68).

[125] ibid.

[126] *Rencontre Africaine pour la defense des droits de l'homme (RADDHO) v Zambia*, comm no 71/92, 10th Annual Activity Report of the Af Cm HPR (2000).

life (article 18) and the prohibitions against the expulsion (article 12(4)) and mass expulsion (article 12(5)) of non-nationals.[127] *African Institute* concerned the Guinean President's proclamation over the radio that Sierra Leonean refugees should be arrested, searched and detained. This led to massive violations of their rights by civilians and by the military; many of the refugees were forced to flee for a second time. The African Commission found violations of the rights to non-discrimination (article 2), to life and integrity of the person (article 4), to freedom from torture, cruel, inhuman or degrading punishment and treatment (article 5) and to property (article 14); the African Commission also held that the prohibition against mass expulsion (article 12(5)) had been violated.[128] As mentioned above, the African Commission also found the 1969 Convention's article IV non-discrimination provision to have been violated.[129]

Doebbler related to the repatriation and return of 14,000 Ethiopian refugees in Sudan.[130] They fled the Mengistu regime prior to 1991; in September 1999, Sudan invoked the 1951 Convention's article 1C(5) cessation clause and concluded an agreement with UNHCR for the refugees' repatriation. The complainant, a lawyer for the affected refugees, alleged their continuing need for international protection and characterised the repatriation as *refoulement*. He alleged that the repatriation and the treatment of the refugees in relation to it violated article 4 on the right to life, article 5 prohibiting torture, cruel, inhuman or degrading punishment and treatment, article 6

[127] *Union interafricaine des droits de l'homme and others v Angola* comm no 159/96, 11th Annual Activity Report of the Af Cm HPR (1997).

[128] African Institute (n 53) para 74.

[129] ibid.

[130] *Curtis Francis Doebbler v Sudan*, comm no 235/00, 27th Annual Activity Report of the Af Cm HPR (2009).

on the right to liberty and the prohibition of arbitrary arrest, article 12(3) on the right to seek and obtain asylum, article 12(4) prohibiting the arbitrary expulsion of non-nationals and article 12(5) prohibiting the mass expulsion of non-nationals. The decision considered the 1969 Convention—as well as the 1951 Convention—but unlike *African Institute*, this consideration had the limited purpose of exploring and explaining cessation and *non-refoulement*; the African Commission did not consider whether the provisions underlying these issues had themselves been violated. Ultimately, the African Commission ruled in favour of the respondent state. It did so largely on the facts, holding that 'the Communication was filed in anticipation of a violation, which did not happen in actual fact after the implementation of the cessation clause [was] set in motion'.[131]

Next in the repatriation and return line of cases came *Malawi African Association and Others v Mauritania*,[132] which joined a number of communications related to the treatment by Mauritania of its black population between 1986 and 1992, and in particular in April 1989 when it expelled about 50,000 black Mauritanians to Senegal and Mali. *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions v Sudan* also addressed state obligations to returning refugees, among other things.[133] Together these cases demonstrate the African Commission's willingness to hold refugee-producing states accountable for returnees' Charter rights.

[131] ibid para 167.

[132] Comm nos 54/91, 61/91, 98/93, 164/97 to 196/97, 210/98, 13th Annual Activity Report of the Af Cm HPR (2000).

[133] Comm nos 279/03 to 296/05, 28th Annual Activity Report of the Af Cm HPR (2009).

The Commission's refugee jurisprudence has done little to elaborate upon the African Charter provisions of particular significance to refugees (which were themselves discussed above in section 2 of chapter 5). The Commission's refugee jurisprudence does not feature much sophisticated reasoning, a criticism that has been made of the Commission's case law more generally.[134] The holdings in early African Commission decisions were articulated in no more than two lines. Since then, the Commission's findings have become longer and its reasoning more elaborate, due largely to 'Commissioners who were prepared to articulate reasons more clearly, … better secretarial support, … the improved contribution of pleadings by the parties … [and] greater and increasingly critical engagement of states'.[135] Yet, despite these improvements, Viljoen continues to characterise Commission jurisprudence as sometimes 'incoherent'.[136] While none of the Commission's refugee decisions can be characterised as such, they do fail to elucidate the relevant provisions in the refugee context. If the above discussion of African Commission cases advanced by or on behalf of refugees was largely limited to an enumeration of the provisions found to have been violated, this is an unfortunate reflection of the decisions themselves.

The above-mentioned cases brought by or on behalf of refugees (and in some cases, other non-nationals) demonstrate that, jurisprudential deficiencies notwithstanding, the African Commission is nevertheless a viable forum for the enforcement of refugee rights. This is important because refugees, by definition, lack redress in their own countries, and as outsiders may face obstacles to accessing

[134] For a summary of this criticism, see Rachel Murray, 'International Human Rights: Neglect of Perspective from African Institutions' (2006) 55 Intl & Comp LQ 193.

[135] Viljoen (n 12) 336.

[136] ibid 296.

justice in host states. Moreover, while there is no body with meaningful oversight of the 1969 Convention, *African Institute* demonstrates that its provisions can nevertheless be enforced on a case-by-case basis by the African Commission.

The reality, however, is that very few refugees in Africa will have the awareness, funds and/or connections required to bring a communication to the African Commission. Indeed, compared with other regional human rights systems, the African Commission attracts only a 'minute number of cases',[137] and just a tiny fraction of this minute number comes from refugees. Moreover, while useful for those few refugees who can access it, the case-by-case enforcement of refugee rights by the African Commission yields at best only patchwork protection. It is therefore likely that among the African Commission's refugee protection tools, its promotional mandate holds the most promise for refugees. It is imperative that the African Commission bolster its efforts in this regard, and work with the new African human rights courts, which also have a role to play in refugee protection.

C. THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

Calls for the creation of an African human rights court originated at a 1961 Lagos meeting of African jurists.[138] Conditions were not, however, conducive to the establishment of such a court until the early 1990s, when the Cold War ended and

[137] Christof Heyns, 'Some Thoughts on Challenges Facing the International Protection of Human Rights in Africa' (2009) 27 NQHR 447, 447.

[138] Philip Amoah, 'The African Charter on Human and Peoples' Rights: An Effective Weapon for Human Rights?' (1992) 4 Afr J Intl Comp L 226, 238.

waves of democratization swept states in Africa.[139] The latter led to greater reliance on national constitutional courts, while the former gave human rights increased prominence worldwide.[140] These developments, together with pressure from NGOs,[141] made human rights 'accepted widely enough in Africa … for the decision to be made to give more "teeth" to the African human rights system in the form of a Court'.[142]

In 1994, the OAHG adopted a resolution requesting that the OAU Secretary General 'convene a meeting of government experts to ponder in conjunction with the African Commission on Human and Peoples' Rights over the means to enhance the efficiency of the Commission in considering particularly the establishment of an African Court on Human and Peoples' Rights'.[143] This commenced the process of drafting the Interim Court Protocol,[144] which was ultimately adopted in 1998 and entered into force in January 2004, creating a court aimed at complementing the African Commission's protective mandate.[145] The Interim Court's first eleven judges were elected by the AHG in January 2006 and were sworn in during June of the same year. In August 2007, the Court concluded a host agreement with Tanzania. Interim Rules of Procedure were adopted on 20 June 2008 and were replaced on 2 June 2010

[139] Heyns (n 26) 686.

[140] Andre Mbata B Mangu, 'The Changing Human Rights Landscape in Africa: Organisation of African Unity, African Union, New Partnership for Africa's Development and the African Court' (2005) 23 NQHR 379, 397.

[141] Viljoen (n 12) 412.

[142] Heyns (n 26) 686.

[143] OAU (OAHG), 'Resolution on the African Commission on Human and Peoples' Rights' (OAU Tunis 13–15 June 1994) AHG/Res.230 (XXX) para 4.

[144] (n 2); for a brief account of the drafting process, see Viljoen (n 12) 412–3.

[145] Interim Court Protocol (n 2) art 2.

with Rules of Court adopted further to harmonization discussions with the African Commission.[146]

The Interim Court has jurisdiction to hear contentious cases concerning the African Charter, its own establishing protocol and 'any other relevant human rights instrument ratified by the States concerned'.[147] The Interim Court's sources of law are, accordingly, 'the Charter and any other relevant human rights instruments ratified by the States concerned'.[148] The Interim Court can therefore undoubtedly hear cases concerning, and apply, the 1969 Convention.[149] The absence of the word 'African' from article 3 on jurisdiction and article 7 on sources of law suggests that the Interim Court may even adjudicate and apply international human rights treaties ratified by the states in question.[150] The Interim Court can also issue advisory opinions 'on any legal matter relating to the Charter or any other relevant human rights instrument'.[151] Advisory opinions may be requested by AU member states, the AU or any of its organs and 'any African organization recognized by' the AU.[152] Viljoen argues that this latter category should include 'all African NGOs that enjoy observer status with the African Commission, … civil society organizations represented on the AU Economic, Social and Cultural Council, … regional economic arrangements … [and]

[146] Rules of Court (adopted 2 June 2010, entered into force 2 June 2010) <http://www.african-court.org/pt/images/documents/Court/Interim%20Rules%20of%20Court/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final__English_7_sept_1_.pdf> accessed 30 April 2015.

[147] Interim Court Protocol (n 2) art 3(1).

[148] ibid art 7.

[149] Naldi and D'Orsi (n 86) 50; Viljoen (n 12) 435–6.

[150] Viljoen (n 12) 437.

[151] Interim Court Protocol (n 2) art 4.

[152] ibid.

[o]ther African organizations … in so far as they work in association with the AU or AEC'.[153]

The Interim Court's expansive subject matter jurisdiction, coupled with its definitively binding judgments, represented great promise for human rights in Africa. This promise is undermined, however, by the rules governing access.[154] These prohibit individual and NGO access to the Court unless the defendant state has filed a declaration in this regard.[155] Only six states have made article 34(6) declarations permitting individual and organisational standing.[156] Automatic standing in contentious cases is accorded to the African Commission and to states parties to the Interim Court Protocol, provided the state has lodged a complaint before the African Commission, is the subject of such an African Commission complaint or is acting further to the violation of the rights of one of its citizens.[157] African intergovernmental organisations also enjoy automatic standing in contentious cases.[158] This approach to access prevents the Interim Court from becoming a forum for the vindication of individual rights, leaving this role to the African Commission. Generally speaking, however, human rights commissions tend to be most effective at addressing widespread and massive patterns of human rights violations, while courts

[153] Viljoen (n 12) 447.

[154] See, generally, Dan Juma, 'Access to the African Court on Human and Peoples' Rights: A Case of the Poacher Turned Gamekeeper' (2007) 4 Essex Hum Rts Rev 1; regarding individuals, see Frans Viljoen, 'A Human Rights Court for Africa, and Africans' (2004-2005) 30 Brooklyn J Intl L 1.

[155] Interim Court Protocol (n 2) arts 5(3) & 34(6).

[156] Burkina Faso, Ghana, Malawi, Mali, Tanzania and Rwanda.

[157] Interim Court Protocol (n 2) art 5(1).

[158] ibid.

are best suited to individual cases.[159] The architecture of the African human rights system either reverses this pattern, or saddles the African Commission with the burden of addressing both systemic and individual violations. The opportunity to correct this arose in July 2004—just six months after the Interim Court Protocol's entry into force—when the AHG decided to create the Merged Court by merging the Interim Court with the African Court of Justice. The Merged Court Protocol, however, features the same access rules as those governing the Interim Court.[160]

1. Engagement with refugee protection

The Interim Court's access rules certainly limit its refugee protection role. Of the 24 cases finalised by the Court since its establishment, only *Michelot Yogogombaye v Senegal* (*Yogogombaye*) raised a refugee protection issue,[161] though the Chadian applicant Michelot Yogogombaye was not himself a refugee and the purported refugee law issue was poorly articulated. The application concerned efforts by Senegal to prosecute Hissene Habré—who had been living in Senegal as a refugee since 1990—for international crimes he is alleged to have committed while he was the President of Chad. The applicant alleged, among other things, that the prosecution violated the 1969 Convention, though no particular provisions were specified. The Interim Court ruled that the case fell outside of its jurisdiction, because Senegal has not filed an article 34(6) declaration permitting direct access by individual

[159] Heyns and Viljoen (n 28) 427.

[160] Merged Court Protocol (n 6) art 8(3); Annex to the Merged Court Protocol (n 6) art 30(f).

[161] App no 001/08 Af Ct HPR (2008).

plaintiffs.[162] *Yogogombaye* provides a lone example of the chilling effect of the Interim Court's access rules on its engagement with refugee protection. It is surprising that *Yogogombaye* even reached the Court; certainly potential plaintiffs aware of the Interim Court's access rules would not even bother instituting proceedings.

That is not to say, however, that there is no scope for the Interim Court to engage with refugee protection. As mentioned above, the Interim Court certainly has subject-matter jurisdiction over the 1969 Convention. Thus those entities that do have direct access to the Court—the African Commission, states and African intergovernmental organisations—can bring contentious cases regarding it, as can individuals and NGOs whose grievance is against a state that has filed an article 34(6) declaration. Moreover, as demonstrated in chapter 5 and above, the 1969 Convention is far from the only treaty relevant to refugee protection; the African Charter also has a role to play, and it is beyond a doubt that this instrument is within the Court's jurisdiction. As discussed above, the Court may even have jurisdiction over international instruments bearing on refugee protection, such as the 1951 Convention and the international human rights covenants, though it could be problematic if the Court were to exercise jurisdiction in this regard.[163]

Among the entities with direct access to the Court, the one most likely to bring refugee protection cases to the Interim Court is probably the African Commission. It has yet to do so, however the African Commission did bring a case

[162] ibid para 46.

[163] See Viljoen (n 12) 437.

against Libya, in which it alleged serious and widespread human rights violations.[164] The African Commission can also request advisory opinions 'on any legal matter relating to the Charter or any other relevant human rights instrument',[165] which includes refugee protection instruments such as the 1969 Convention. Also likely to advocate on behalf of refugees are NGOs. While NGOs do not have direct access to the Interim Court in contentious cases, as discussed above they do arguably have standing to request advisory opinions. The ability of the Interim Court to play a role in refugee protection is, however, less important than that of the New Merged Court, because the Interim Court's days are numbered. When the New Merged Court Protocol enters into force, its jurisdiction will supplant that of the Interim Court.

D. THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS AND THE AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLES' RIGHTS

The African Court of Justice was to adjudicate matters relating to the AU Constitutive Act. However, it was never—and never will be—established, because before its establishing protocol entered into force,[166] the AHG decided to merge the African Court of Justice with the Interim Court, in order to avoid 'the danger of not having enough funds to do what we should do and just proliferating organs'.[167] As mentioned above, this decision led to the adoption in 2008 of the Merged Court Protocol, creating the Merged Court. The Merged Court Protocol was superseded in 2014 by

[164] *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya* app no 004/2011 Af Ct HPR (2011).

[165] Interim Court Protocol (n 2) art 4.

[166] Protocol of the Court of Justice of the African Union (n 4).

[167] President Obasanjo, cited in Viljoen (n 12) 449.

the New Merged Court Protocol,[168] which created the New Merged Court. The New Merged Court is largely identical to the Merged Court, with the addition of jurisdiction over international criminal matters.[169] The New Merged Court Protocol will enter into force 30 days after it receives its fifteenth ratification,[170] at which time the New Merged Court's jurisdiction will automatically supersede that of the Interim Court, as well as the theoretical jurisdiction of the Merged Court and that of the African Court of Justice,[171] neither of which will ever be established. As of June 2015, the AU had not published any New Merged Court Protocol signature and ratification information.

The New Merged Court's human rights jurisdiction is largely the same as that of the Interim Court. While the Interim Court has jurisdiction over 'the interpretation and application of the Charter, … [the Interim Court Protocol] and any other relevant Human Rights instrument ratified by the States concerned',[172] the New Merged Court has jurisdiction over matters relating to 'the interpretation and the application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter … on the Rights of Women in Africa, or any other legal instrument relating to human rights, ratified by the States Parties concerned'.[173] Like the Interim Court, the New Merged Court also has jurisdiction to adjudicate the 1969

[168] New Merged Court Protocol (n 9).

[169] New Merged Court Protocol (n 9) Annex, arts 13 and ff. This jurisdiction covers the international crimes of genocide, crimes against humanity, war crimes, unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources and aggression.

[170] ibid art 11(1).

[171] ibid art 6 *bis*.

[172] Interim Court Protocol (n 2) art 3.

[173] Merged Court Protocol (n 6) art 28(c).

Convention, though in the new court's case this is on the basis of its jurisdiction relating to 'the interpretation, application or validity of … Union treaties and all subsidiary legal instruments adopted within the framework of the Union' or the OAU.[174]

1. Engagement with refugee protection

While the New Merged Court's jurisdiction over human rights and the 1969 Convention largely mirrors that of the Interim Court, other aspects of the New Merged Court's jurisdiction broaden its capacity to address refugee protection. The New Merged Court has jurisdiction over legal disputes relating to 'any question of international law',[175] 'all acts, decisions, regulations and directives of the organs of the Union'[176] and 'the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union'.[177] The New Merged Court's international law jurisdiction—as well as its broad international criminal jurisdiction—could allow it to address causes of displacement, including acts of aggression, occupation, foreign domination or events seriously disturbing public order. The New Merged Court's jurisdiction over AU organs means it can adjudicate any issues that may arise from the AU refugee protection activities described in the preceding chapter. Finally, the court's incredibly broad jurisdiction over breaches of obligations owed to the AU or its member states mean the New Merged Court could

[174] ibid art 28(b).

[175] ibid art 28(d).

[176] ibid art 28(e).

[177] ibid art 28(g).

be seized of matters related to the causes of displacement or stemming from a state's breach of its refugee protection obligations.

The exercise of this theoretically broad jurisdiction of course depends on the willingness of entities with standing to bring refugee protection matters before the New Merged Court. As with the Interim Court, standing to submit cases to the New Merged Court is accorded to states parties and to the AHG and organs of the AU,[178] as well as to the Office of the Prosecutor, which will be established within the AU to try international criminal matters.[179] The list of entities with standing in matters stemming from the New Merged Court's article 28(c) human rights jurisdiction is longer, also including the African Commission, the African Committee of Experts on the Rights and Welfare of the Child, African intergovernmental organisations and African national human rights institutions;[180] 'African individuals' and 'African Non-Governmental Organizations' with AU observer status also have standing if the state in question has filed an article 9(3) declaration permitting this.[181]

The New Merged Court Protocol makes it possible for the new continental court to assume a broad role in refugee protection, extending beyond the adjudication of individual rights to include state responsibility for causing displacement and for the breach of state refugee protection obligations. At the moment, however, this jurisdiction is entirely theoretical: the New Merged Court Protocol has yet to enter

[178] Merged Court Protocol (n 6) arts 29(a) & (b); AU staff members may also appeal disputes under the AU Staff Rules and Regulations to the New Merged Court (Merged Court Protocol (n 6) art 29(c)).

[179] New Merged Court Protocol (n 9) art 15.

[180] Merged Court Protocol (n 6) art 30.

[181] New Merged Court Protocol (n 9) art 16.

into force, and when is does, the new court's activity in this regard will depend almost entirely on the willingness of entities with standing to involve the Court in refugee protection.

E. CONCLUSIONS

It is too early to make a summary assessment of the record of judicial engagement with refugee protection in Africa. While the African Commission has involved itself in refugee issues for over 20 years, the Interim Court has never adjudicated a refugee case on its merits, and the New Merged Court has yet to be established. The system's architecture, however, holds promise. The African Commission's promotional mandate creates space to address prevention and systemic issues and the African Commission has a mandate to supervise the 1969 Convention. Violations in individual cases can be addressed within the African Commission's protective mandate or, given the poor record of compliance with the African Commission's quasi-judicial findings, by the Interim Court and, eventually, by the New Merged Court. The latter institution's broad subject matter jurisdiction, including its international criminal jurisdiction, creates a forum to address state responsibility for producing refugees as well as responsibility for breaches of refugee protection obligations.

Unfortunately, however, the African Commission's refugee protection record suggests a disconnect between the system's potential and what it might actually achieve. The African Commission's record of involvement with refugees spanning over two decades has not produced a single success story. Its promotional initiatives have produced poor or, at the very best, mixed results. Little has come of the

ambitious memorandum of understanding concluded between the African Commission and UNHCR, and there has been only limited cooperation between the African Commission and the AU in refugee matters. In the 12 years since it was awarded supervisory authority over the 1969 Convention, the African Commission has not undertaken a single activity in this regard. The effectiveness of the Special Rapporteur has been limited, and resolutions and concluding observations adopted in the refugee arena have done little to improve protection. The African Commission has addressed a number of refugee communications in its protective role, but thanks to the difficulty of accessing the African Commission, these represent only a tiny fraction of the refugee rights violations occurring in Africa. Moreover, refugee cases are not immune from the poor record of compliance with African Commission decisions more generally.

Overall, the African Commission 'cannot be said to have developed a coherent policy on human rights and refugees'.[182] In a sense, however, the African Commission is halfway there. Mubangizi argues that '[a]lthough there has been criticism regarding the lack of clear mechanisms to deal with the issue of refugees as a whole, it is clear that the African [human rights] system has paid reasonable attention to the rights of refugees'.[183] The African Commission has indeed recognised the importance of addressing refugee issues; the challenge now is to address them coherently and effectively, which cannot be divorced from the challenges facing the African Commission more generally.[184]

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[182] Murray (n 69) 61.

[183] John Mubangizi, 'Some Reflections on Recent and Current Trends in the Promotion and Protection of Human Rights in Africa: The Pains and the Gains' (2006) 6 Afr Hum Rts LJ 146, 158.

[184] See Viljoen (n 12) 295 & ff.

If the African Commission can achieve this, the Interim Court's binding human rights jurisdiction and the New Merged Court's eventual public international and international criminal law jurisdiction would be effective complements. The African Commission could focus on systemic issues within its promotional mandate while the Interim Court or the New Merged Court could address individual and discrete matters. The architecture of a system featuring institutions with complementary mandates is in place. The challenge now is to realise their potential.

CHAPTER 8

CONCLUSION

This work has articulated the regional legal framework for refugee protection in Africa, broadly conceived as incorporating both refugee and human rights law elements, as well as treaty and institutional components. It analysed the relationships of interpretation and the relationships of conflict incidental to construing the regional law of refugee protection in this broad manner. The work also included legal history essential to a contemporary understanding of the legal framework for refugee protection in Africa, beginning in the first substantive chapter with the drafting of the 1969 Convention.

This drafting history in chapter 2 revealed the common understanding of the impetus for a regional refugee instrument—that the international regime was incapable of addressing African realities—as a fiction. Rather, the process of drafting the 1969 Convention commenced with a view to making international refugee law applicable in Africa, as well as to tackling the problem of subversion. Only when the entry into force of the 1967 Protocol addressed the former issue did drafting an Africa-specific regime come to the fore of the agenda, resulting in the adoption of an instrument devoted exclusively to refugee issues particular to Africa. This instrument was the subject of chapter 3.

Chapter 3 covered the 1969 Convention's major legal innovations and addressed widely held misconceptions about it. The innovations were the article I(2) regional refugee definition; the progressive development of an individual right to

asylum; the broadening of *non-refoulement*; and the formalisation of responsibility sharing, a form of temporary protection and voluntary repatriation. The misconceptions all related to the purportedly broad nature of the regional refugee definition. In this connection, first it was argued that the events justifying flight under the 1969 Convention's article I(2)—external aggression, occupation, foreign domination or events seriously disturbing public order—are less relevant today than they were when the 1969 Convention was drafted. Second, the extent of the regional refugee definition's objectivity was assessed in relation to the 1951 Convention's refugee definition, and regarding whether article I(2) requires a nexus between the relevant 1969 Event and flight; it was argued that the regional refugee definition is less objective than is often posited. The third and final misconception addressed was that the 1969 Convention in general and article I(2) in particular apply only to, or provide the legal foundation for, the 'group' determination of refugee status. This was found not to be the case. Taken together, these three misconceptions have led to a pervasive view of the article I(2) refugee definition as very broad. Once the misconceptions were unpacked, it became clear that article I(2) is not nearly as broad as is often suggested.

Together chapters 2 and 3 analysed the 1969 Convention with a view to correcting common misconceptions about it. Chapter 4 went beyond misconceptions and analysed a critical aspect of the 1969 Convention on which the literature is silent: the nature of the relationship between it and the 1951 Convention. In adopting a treaty that addresses only refugee issues particular to Africa, the OAU created a legal regime in which two distinct instruments work together, in particular regarding refugee status and its associated rights. Arguments grounded in *lex specialis*, equality

and the law of treaties and general international law led to the conclusion that article I(2) of the 1969 Convention expands the class of individuals who may qualify for refugee status, while the rights framework applicable to such individuals is derived from the 1951 Convention.

In addition to this systemic relationship issue, the parallelism between the 1951 and 1969 conventions also gives rise to a number of more isolated relationship issues, of interpretation and of conflict. The 1951 Convention's 'compelling reasons' proviso was analysed in the former category. In the conflict category were freedom of movement, freedom of association and obligations regarding the provision of travel documents. Each of these apparently conflicting relationships was resolved through treaty interpretation.

In addition to the 1951 Convention's rights framework, refugees in Africa also enjoy human rights guaranteed under international and regional law. Chapter 5 addressed regional human rights law in refugee protection. It began with a general discussion of the role of human rights in refugee protection. Chapter 5 then moved on to a specific discussion of the core instruments of the African regional human rights regime, beginning with the African Charter. Its contributions to non-refoulement and asylum, and to rights during the period of refuge, were canvassed. This was followed by a brief discussion of the Women's Protocol and the Children's Charter.

The literature is as silent on the relationship between regional human rights law and the 1969 Convention as it is regarding the latter instrument and the 1951 Convention. The concurrent applicability of regional refugee and human rights law to

the same population gives rise to relationships of interpretation and to relationships of conflict. Asylum and return were analysed in the former category. Relationships of conflict arise between the 1969 Convention's prohibition of subversive activities and political rights under the African Charter, and regarding freedom of movement. The analysis determined that the prohibition of subversive activities should yield to political rights in respect of activities that are not truly 'subversive'. Speech or acts that rise to the level of subversion should be permitted unless such speech or acts are caught by permissible limitations on political rights. The apparent conflict regarding freedom of movement was resolved through treaty interpretation: the default position is that refugees have freedom of movement, however organised settlements may be permitted in exceptional circumstances.

Chapter 5 was the final instalment in Part One on the treaty framework. Part Two on the institutional architecture supportive of this legal framework began with the chapter 6 survey of the OAU's historic role and the AU's contemporary role in refugee protection in Africa. This discussion revealed that the AU, and the OAU before it, have staged a plethora of refugee-focused events, authored innumerable soft law documents on refugees and created a number of bodies with refugee protection mandates. The scale and scope of engagement has not, however, produced commensurate results for refugees.

The African Commission, discussed in chapter 7, has been similarly ineffective. It is not clear that its promotional work on refugees has been of any effect. Only a tiny fraction of the judgments issued under its protective mandate have related to refugees and these—like all African Commission cases—have an inconsistent

record of implementation and enforcement. It is too early to assess the refugee protection record of the newly established Interim Court, which will any case cease to exist when the New Merged Court is established, however the new system's architecture holds promise for refugees. It remains to be seen whether the New Merged Court will be able to produce better results for refugees than predecessor OAU and AU institutions have achieved.

Together these six chapters have outlined and analysed the regional legal regime for refugee protection in Africa. The picture that has emerged is of a relatively complete legal framework. The international and regional refugee treaties together create a framework to address the particular situation of exiled individuals, while international and regional human rights law supplement these refugee-specific provisions with protections that benefit all human beings. A steadily expanding and evolving network of institutions complement these legal instruments. Bodies with refugee protection mandates were, and continue to be, created, and gaps in the system have been identified and filled, for example by endowing the African Commission with oversight of the 1969 Convention. This moribund appointment is, however, an unfortunately archetypal example of the disjuncture between refugee protection activities and their effects.

Indeed, the robustness of the legal and institutional regime is not reflected in the practical situation for refugees on the continent. Over a quarter of the world's refugees reside in Africa,[1] and to say that their circumstances do not reflect the

[1] UNHCR, *UNHCR Statistical Yearbook 2013* <http://www.unhcr.org/54cf9bd69.html> accessed 9 June 2015, 7.

promise of regional refugee and human rights law is a massive understatement.[2] As is the case in many human rights contexts, the issue is not the law, but rather its implementation. To borrow Heyns and Viljoen's terminology, the regional refugee protection system features a high level of 'norm recognition' paired with a low level of 'norm enforcement'.[3] Implementation of the legal framework must be improved at the regional level, by improving the effectiveness of the institutions and initiatives discussed in chapters 6 and 7, and implementation must also be improved at the national level. According to Heyns and Viljoen, 'the domestic level is the most important level on which human rights could potentially be protected by law in Africa' because if 'the legal system of a particular country protects the human rights of everyone within its jurisdiction, there will be no need for higher levels of protection'.[4] This is partially a question of implementing and enforcing the regional legal framework within national jurisdictions, and partially an issue of developing and/or implementing appropriate domestic norms.

The salience of implementation should not, however, be taken to suggest that the regional legal framework itself is not important. To the contrary, before laws can be effectively implemented, they must be understood. The regional law of refugee protection in Africa has for a long time been poorly understood. The extent of the regime was until recently narrowly construed as not including human rights law; the history, and contemporary aspects, of the 1969 Convention were misunderstood; the nature of the systemic relationship between the 1951 and 1969 conventions had not

[2] See chapter 1, n 6.

[3] Christof Heyns and Frans Viljoen, 'An Overview of International Human Rights Protection in Africa' (1999) 15 S Afr J Hum Rts 421, 424.

[4] ibid.

been explored, nor had discrete relationships between these two refugee instruments and between the 1969 Convention on the one hand and regional human rights law on the other; and, most importantly, the regional legal regime for refugee protection in Africa had never been treated as a whole in one work. Now that all aspects of the regional legal regime for refugee protection in Africa have been fully articulated, what remains is for the regime to be properly implemented.

There is an important role for the international community in this regard. The Syrian refugee crisis that captured the world's attention during the (northern hemisphere) summer of 2015 vividly demonstrated that responsibility for hosting refugees is more often than not arbitrarily allocated on the basis of geography, resulting in a highly inequitable distribution of what should be a shared global responsibility. This inequity is attenuated in Africa, where desperately poor countries host many more refugees than much richer states in the global North. Resource scarcity contributes to the adoption of refugee policies, such as encampment, that undermine refugee rights, and is certainly a factor preventing the AU and African states from effectively implementing the regional legal framework for refugee protection.

Rich nations must provide financial, material and technical assistance to support African states and the AU in delivering upon the promise of the regional legal framework for refugee protection. States themselves have recognised the importance of this form of responsibility sharing. UNHCR's ExCom recently issued a statement on 'Enhancing International Cooperation, Solidarity, Local Capacities and

Humanitarian Action for Refugees in Africa'. In it, ExCom member states reaffirmed their

> collective commitment, through enhanced regional and international solidarity, burden-sharing and partnership, to support host countries and communities in building their capacity to better address and resolve the multi-faceted challenges of forced displacement and, in particular, to strengthen protection, improve the situation of refugees, IDPs and stateless persons, and facilitate durable solutions, while taking into account special needs of vulnerable groups including women, children and persons with disabilities.[5]

States must convert this commitment into concerted action, so that the AU and African states can, finally, transform the regional protection framework from promising legal rhetoric into a practical reality for refugees in Africa.

[5] UNHCR ExCom, 'Statement of the Executive Committee on Enhancing International Cooperation, Solidarity, Local Capacities and Humanitarian Action for Refugees in Africa', on the occasion of the high-level segments of the 65th session of the Executive Committee of the High Commissioner's Program (30 September 2014).

ABSTRACT

The Regional Law of Refugee Protection in Africa

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This work offers an analysis of the legal regime for refugee protection in Africa, broadly construed as including both refugee law and human rights elements. The regime is addressed in two parts.

Part One analyses the treaty regime, principally comprised of the 1951 Convention relating to the Status of Refugees, the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa and the African Charter on Human and Peoples' Rights. The latter two regional instruments are examined in depth. This includes the first fulsome account of the 1969 Convention's drafting, and original analysis of the relationships of interpretation and the relationships of conflict that arise between the various treaties comprising the regional refugee protection framework. Significant attention in this regard is devoted to various aspects of the relationship between the international and the regional refugee treaties, and to the relationships between African refugee law on the one hand and African human rights law on the other.

Part Two focuses on the institutional architecture supportive of the treaty framework addressed in Part One. The Organization of African Unity is addressed in a historical sense, and the contemporary roles of the African Union, the African Commission on Human and Peoples' Rights and the various African human rights courts are canvassed.

This account of the treaty framework, and the institutional architecture, for refugee protection on the continent is the first broad analytical account of the regional law of refugee protection in Africa.

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