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Extending the limits or narrowing the scope? Deconstructing the OAU refugee definition thirty years on

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Abstract

The *OAU Refugee Convention* is most recognized for having extended the conventional concept of a refugee beyond the narrower scope of the *1951 Refugee Convention*. Although the OAU refugee definition has been praised for its broad scope, relatively little effort has been made to subject it to a rigorous interpretative analysis. Instead, scholarship has tended to minimize a number of serious interpretive difficulties posed by the definition. The result is an "interpretive consensus" that suggests that three fundamental characteristics differentiate it from the definition found in the 1951 Convention: first, the OAU definition is objective rather than subjective; second, it does not require a specific type of harm or cause of flight; and third, it was primarily designed and intended to be applied to the context of group displacements. On closer examination, this threefold consensus appears untenable and may ultimately be harmful to the broader goal of refugee protection. This paper reviews existing scholarship on the OAU definition and provides a clause by clause analysis of the OAU refugee definition in light of contemporary international refugee law.

1. Introduction[*]

In the 30 years since the *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa* came into force[1] it has proven to be one of the world's most flexible and innovative refugee instruments. In the years following its adoption, Africa has continued to be wracked by conflicts and civil strife leading to the displacement of millions of people. In face of these mass exoduses, the OAU Convention has provided a wide ambit of protection by declaring a refugee to be:

> [E]very 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.[2]

This "extended" refugee definition has long been praised for moving beyond the narrower scope of the1951 refugee definition[3], yet relatively little ink has been spent on examining the criteria it sets forth. Some even go so far as claiming that the "criteria on which refugee status may be granted under [the OAU] definition are self-evident in the broad grounds listed."[4] While there is an intuitive sense to its meaning, the position taken here is that the OAU refugee definition contains significant vagueness and ambiguity which warrant careful consideration. This paper sets out to review the history and scholarship on the OAU refugee definition, to identify shortcomings therein, and to propose legally relevant criteria for interpreting the definition.

2. Genesis of a post-colonial asylum project

When draft work began on the OAU Convention in 1964, Africa was in the throes of decolonization. As early as 1957, a surge of independence movements would see much of the continent enter into anti-colonial struggles leading to the displacement of hundreds of thousands of people.[5] Between 1963 and 1966, the number of refugees in

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[*] This paper is based on a research project originally prepared for the Refugee Status Determination Unit of the United Nations High Commissioner for Refugees, Regional Office, Cairo, Egypt.

[1] *Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, 10* September 1969, 1001 U.N.T.S. 45, No.14691, (entered into force on 20 June 1974). [hereinafter "OAU Convention" or "OAU Refugee Convention"].

[2] *Ibid*. at Art. I(2)

[3] The 1951 Refugee Convention definition is also included in Article 1(1) of the OAU Convention. It declares a refugee to be any person "who owing to a 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."

[4] Lawyers Committee on Human Rights, *African Exodus: Refugee Crisis, Human Rights and the 1969 OAU Convention*, (New York, 1995) at 29 ["African Exodus"].

[5] Bonaventure Rutinwa, "Asylum and refugee policies in Southern Africa" (April 2002) Presented at Workshop on Regional Integration, Poverty and South Africa's Proposed Migration Policy, Pretoria, 50 [Rutinwa]. Emmanuel Opoku Awuku, "Refugee Movements in Africa and the OAU Convention on Refugees" (1996) Journal of African Law 80 [Awuku].

Africa nearly doubled, from 300,000 to 700,000 people.[6] These massive displacements were not unprecedented, but placed a particular burden on the fragile order developing on the continent. This burden was only compounded by Africa's continued exclusion from an international refugee regime limited to "events occurring in Europe prior to 1951."[7]

The historical climate of decolonization has led some to speculate about the motives prompting the OAU Convention's creation. Most prominent is a thesis that sees the OAU Convention as an effort to "africanise"[8] the refugee definition because of alleged deficiencies in the 1951 refugee definition.[9] Some even maintain that the "in Africa, the need for a more inclusive definition was noted from the inception of the 1951 Convention."[10]

The record actually suggests that this thesis is the first in a series of unsupported assumptions about the OAU Convention. Rather than playing a central role in the drafting process, the refugee definition was a minor part of three broader objectives.[11] Chief among these was the desire to balance Africa's traditional hospitality toward strangers[12] with the need to ensure security and peaceful relations among OAU member states. Much of this concern was based on the fact that mass population movements could prompt interstate conflict,[13] particularly if exiles used host countries as bases of operation for subversive activities.[14] Early on, these fears were translated into drafts which were far more limited in terms of legal guarantees than the 1951 Convention. The UNHCR was highly critical of the first two drafts – the Kampala and Leopold drafts - "for being more rigid than the 1951 Convention."[15]

When the Convention was adopted in 1969, the important role of security and subversion became obvious: throughout the Convention, frequent reference is made to

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[6] Dennis Gallagher, "The Evolution of the International Refugee System" (1989) 23 International Migration Review 583.

[7] *Convention relating to the Status of Refugees*, 189 U.N.T.S. 2545, art. I(A)(1). ["1951 Convention"]

[8] Isabelle R. Gunning, "Expanding the International Definition of Refugee: A Multicultural View" (1989 – 1990) 13 Fordham Int'l L.J. 46-48 [Gunning]. Also see See also Awuku, above note 5 at 80.

[9] Gino J. Naldi, *The Organization of African Unity: An Analysis of its Role,* Second Edition (New York: Mansell, 1999) at 79. In particular, many scholars suggest that the 1951 definition was inapplicable or ineffective in the context of mass population displacements, especially when such movements are caused by civil war and other disruptive events.

[10] Jennifer Hyndman and Bo Victor Nyland, "UNHCR and the Status of Prima Facie Refugees in Kenya" (1998) 10 IJRL34. See also Eduardo Arboleda, "Refugee Definition in Africa and Latin America: The Lessons of Pragmatism" (1991) 3 IJRL [Arboleda, "Pragmatism"].

[11] See Pirkko Kourula, *Broadening the Edges: Refugee Definition and International Protection*, (Hague: Martinus Nijhoff, 1997) at 147 [Kourula].

[12] Hatch writes that there is "a tradition and practice of hospitality in the continent, so that an African is always an African. If he leaves one society he will be accepted in another." John Hatch, "Historical Background on the African Refugee Problem", in Hugh C. Brooks & David R. Percy, ed., *Refugees South of the Sahara: An African Dilemma* (Westport: Negro University Press, 1970) at 16.

[13] Louise W. Holburn, *Refugees: A Problem of Our Time* (New Jersey: The Scarecrow Press, 1975) at 183-4.

[14] Early on these concerns prompted the *Resolution on the Problem of Refugees* adopted at Accra in 1965 under which members "pledged themselves to prevent refugees living on their territories from carrying out by any means whatsoever any acts harmful to the interests of other states Members of the Organization of African Unity." AHG/Res. 26(2).

[15] See UNHCR's comments on the 'Leo Draft': UN doc. A/AC.96/31 (29 Oct. 1965) cited to Arboleda, "Pragmatism", above note 10 at 186; also see Ivor Jackson, *The Refugee Concept in Group Situations*, (Netherlands: Martinus Nijhoff, 1999) at 181 [Jackson].

refugees as a potential "source of friction"[16], of "discord"[17] and "the "grant of asylum to refugees is a peaceful and humanitarian act."[18] The OAU Convention explicitly prohibits subversive activities[19] and obliges host states to settle refugees away from borders.[20] Security was the core preoccupation and as Okoth-Obbo remarks, the success of the Convention may be largely measured by its attempt to "depoliticize and cohere the grant of asylum in particular, and the refugee question more generally, in the context of international relations and state security politics."[21]

The framers' second objective was to create an effective regional complement to the 1951 Convention. While the tendency has been to focus on the OAU Convention's controversial aspects, it was never intended to supplant the 1951 Convention. Instead, the drafters were more intent on filling the conspicuous gap left by the 1951 Convention's temporal and geographic limitations. Most of the early drafts simply replicated the 1951 Convention.[22] The Addis Ababa draft of 1965 confirms that: "In all matters relating to the status, condition and treatment of refugees Member States shall, save as hereinafter provided, apply the provisions of the convention relation to the Status of Refugees signed in Geneva on 28 July 1951, irrespective of the dateline and of any geographical limitation."[23] The complementary character is firmly established in the OAU Convention's statement that it "shall be the effective regional complement in Africa of the 1951 United Nations Convention on the Status of Refugees."[24]

The drafters' final objective was to create a convention that would meet the specific needs of African refugees. It is the extended definition which gives clearest voice to this goal. As its most celebrated feature, it is ironic that it was not until 1967 - three years after draft work began - that it was first "officially expressed that the 1951 Convention definition – while universally applicable – might not be sufficient to cover all refugee situations in Africa."[25] In particular, there was concern that the 1951 definition did not cover refugees "from independent states and those from countries struggling against colonial rule or domination by a white minority."[26] Eventually, the OAU Council of Ministers was prompted to transmit a report and recommendations to the Commission of Refugees which contained the following draft refugee definition.

> The 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

[16] OAU Convention, above note 1, Preamble.
[17] *Ibid.*
[18] *Ibid.,* Art. II(2)
[19] *Ibid.,* Art. III(2)
[20] *Ibid.*, Art. II(6)
[21] George Okoth-Obbo, "Thirty Years ON: A legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa," (2001) 20 Refugee Survey Quarterly 90 [Okoth-Obbo].
[22] See Jackson, above note 15 at 178-191.
[23] Addis Ababa Draft, Art. 1(1) printed in Jackson, above note 15 at 183.
[24] OAU Convention, above note 1 at Art. VIII(2).
[25] *Report of Conference on the Legal, Economic and Social Aspects of African Refugee Problems held in Addis Ababa on 9-18 October 1967*, at para. 81, reprinted in Jackson, above note 15 at 187 ["Addis Ababa Conference"]. See also Jackson, above note 15 at 182 and 185-6.
[26] Addis Ababa Conference, above note 25 at para. 82.

> inside or outside his country of nationality in order to seek refuge in another place within or outside his country of origin or nationality.[27]

The relationship between this definition and the final definition is clear. However, prior to adopting the final draft in 1969, the Commission on Refugees would make a few adjustments. Because of its ambiguity, 'internal subversion' was replaced by the word "disorder"[28] and eventually with events seriously disturbing public order. It was also "agreed that a person could only be a refugee outside of his national territory," so the term "inside or outside his country of nationality was omitted."[29]

The late addition of the extended definition indicates that it played a less significant role in the creation of the OAU Convention than is often believed. Some have even suggested that the definition was intended to be a "declaratory statement with respect to interpreting the 1951 Convention definition."[30] Whatever its origins, the decades that have followed its adoption attest to the definition's independent significance. This brief history reveals some of the drafters' core preoccupations in respect of the refugee question in Africa. However, what remains to be seen is how effectively the drafter's objectives were embraced by the framework set out in the OAU Convention's refugee definition. This question takes up the remainder of this paper.

3. Interpreting the OAU definition: an illusion of consensus

Although the extended refugee definition has been hailed for broadening the concept of a refugee, scholarship has usually been limited to bouts of interest prompted by the Convention's landmark anniversaries. With few exceptions, these 10 year, 20 year or 30 year discussions tend to be thick on accolades but thin on rigorous analysis.[31] Thus, to claim that there is an interpretive consensus might be misleading. Indeed, if any consensus exists, it is only found in a shared reverence for the definition's broadness which tends to mask the definition's vagueness and ambiguity. Taken as a whole, the "consensus" may be loosely categorized around three general propositions: first, the OAU refugee definition is objective rather than subjective; second, it creates a framework within which the cause of harm and motive of flight may be indeterminate; and finally, the extended definition is said to have been drafted with an intention to create a group refugee definition. Below it will be shown that these propositions do not stand up to close scrutiny, indicating that the definition must be approached with more care and deliberation than has been shown thus far.

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[27] See Administrative Secretary-General Report, Document Cm/228 at para. 8 reprinted in Jackson above note 15.

[28] Jackson, above note 15 at 190.

[29] *Ibid*.

[30] Kourula states that the declaratory interpretation was confirmed in interviews "with UNHCR staff who participated in the drafting." Kourula, above note 11 at 149. Yet elsewhere, Peter Nobel and Goran Melander, who both participated extensively in the drafting process, state that the "OAU Refugee Convention provides for two categories of refugee." They are clear that OAU definition was "a valuable addition specifically designed to meet the requirements of African reality." Emmanual K. Dadzie, Goran Melander and Peter Nobel, "Report of the Seminar Legal Aspects on the African Refugee Problem." Goran Melander and Peter Nobel ed., *African Refugees and the Law*. (Sweden: Almqvist & Wiksell International, 1978) at 77 [Melander & Nobel].

[31] Notable exceptions include: Arboleda, above note 10; Jackson, above note 15; and, in particular, Okoth-Obbo, above note 21.

3.1 The objective refugee

Unlike the mixed subjective-objective test in the 1951 refugee definition, the extended definition is said to be "based solely on objective criteria, meaning that persons leaving their country of origin […] are to be given refugee status […] irrespective of whether or not they can satisfy the subjective criteria."[32] In one the earliest comments, Mr. Ousmane Goundiam, former Director of the Legal Division of the UNHCR, remarks that the OAU definition declares an asylum-seeker to be a refugee "without first having to justify fear of persecution in terms of [1951 Convention definition]."[33] Because an OAU refugee is every person who is *compelled* to take flight, they are not required to satisfy the subjective, psychological factor of fear.[34] Instead, the OAU definition is said to focus on the "unbearable and dangerous conditions which set entire populations on the move"[35] and looks to "the objective circumstances which have compelled flight [rather than] the individual's personal subjective reaction to the adversity she perceives."[36] As a consequence, the definition draws our attention to the "objective conditions prevailing in the country of nationality or habitual residence,"[37] which involves an examination of whether the facts of a specific situation fit within the definition's specified causes of flight.

In effect, this thesis posits two explanations for the OAU definition's objective quality: first, it is objective because the word *fear* has been replaced with the word *compelled*; and second, it is objective because it focuses on a series of objective events in an asylum-seeker's country of origin. But this explanation seems unsatisfactory and may miss a more important distinction. To begin, it overestimates the importance of the subjective element in the 1951 definition. Some argue that fear was never intended to introduce a subjective element[38], but was meant to incorporate a prospective risk assessment into the definition. Although case law has confirmed the need for a subjective element[39], in practice, it tends to be of secondary importance to the objective element of "well-foundedness."[40]

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[32] Awuku, above note 5 at 81. See also Joe Oloka-Onyango "Human Rights, the OAU Convention and the Refugee Crisis in Africa: Forty Years After Geneva" (1991) 3 IJRL 455-6.

[33] Ousmane Goundiam, "African Refugee Convention" 1970 (March/April) *Migration News* 3.

[34] Nicholas Sitaropoulos, *Judicial Interpretation of Refugee Status* (Athens: Baden-Baden, 1999) at 67 [Sitaropoulos]. See also Eduardo Arboleda, "The Cartagena Declaration of 1984 and its Similarities to the 1969 Convention – A comparative Perspective" 1995 (Special Issue) IJRL 94 [Arboleda, "Comparative Perspective"]. See Toby D. Mendel, "Refugee Law and Practice in Tanzania" (1997) 9 International Journal of Refugee Law 54 [Mendel].

[35] M.R. Rwelamira, "Two Decades of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problem in Africa" (1989) 1 IJRL 559 [Rwelamira].

[36] Okoth-Obbo, above note 21 at 112.

[37] Andre du Pisani and Maxi Schoeman. "Legal Instruments" in Jim Whitman ed., *Migrants, Citizens and the States in Southern Africa* (New York: St. Martins Press) at 39.

[38] James C. Hathaway, *The Law of Refugee Status*, (Toronto: Butterworth) at 3.1 (KIMS/REFWORLD)[Hathaway].

[39] In *Kamana*, for example, Madam Justice Tremblay-Lamer states: "The lack of evidence going to the subjective element of the claim is a fatal flaw which in and of itself warrants dismissal of the claim, since both elements of the refugee definition -- subjective and objective -- must be met." *Kamana, Jimmy v. M.C.I.* (F.C.T.D., IMM-5998-98), Tremblay-Lamer, September 24, 1999 at para. 10. Also see the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (1979), at para. 37 – 42, which emphasize the subjective element in the 1951 refugee definition.

[40] "Interpretation of the Convention Refugee Definition in the Case Law" Legal Services: Immigration and Refugee Board (2002), at 5.1 < http://www.irb-cisr.gc.ca/en/about/tribunals/rpd/crdef/crdef05_e.htm#note2>; see also Hathaway, above note 38 at 3.1.3.

What is more troubling is that the explanation proceeds from an assumption that the term "compelled" is objective. Although compelled *may* be objective, no one has offered satisfactory explanation for why it does not contain a subjective element. Compelled could relate to a subjective feeling or preference, as in, "she felt compelled to help the needy." Is 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.

The second part of the explanation is similarly puzzling. The objective element is also said to depend on the inclusion of the four OAU events: external aggression, occupation, foreign domination, and events seriously disturbing public order. However, to contrast this with the 1951 definition appears incoherent unless we adopt the untenable position that *persecution* – the comparable harm in the 1951 definition – contains a subjective element. While persecution is a relatively ill-defined concept, the case law suggests an objective assessment and defines persecution as serious harm.[41] It is not the subjective perceptions of the individual that determine its content; it is an objective assessment of whether a factual situation discloses the existence of persecution. In other words, the OAU events do not particularly distinguish it from 1951 definition in so far as its objectiveness is concerned.

Taken alone, these explanations appear to need further development. As will be shown below, it is neither the term "compelled" nor the "OAU events" that make the definition objective, but, among other things, the relationship between the two. What is more interesting is that the emphasis on the definition's objective element may have overlooked a more essential distinction, which lies not in objectivity or subjectivity, but in two differing philosophies of asylum.

The most striking feature of the 1951 definition is not its subject element, but the way it has been "carefully phrased to include *only persons who have been disfranchised by their state on the basis of race, religion, nationality, membership of a particular social group, or political opinion.*"[42] The definition is a product of a particular liberal philosophy which has as its major terms the "State and Individual, and the respective rights of the State and the Individual."[43] Equality and individualism were placed at the core of the 1951 Convention which resulted in a definition that tended to favour those persons "whose flight was motivated by pro-Western political values."[44] The result is a definition which does not seek to enshrine the right to a safe and stable communities; it seeks to ensure that an individual will be free from discrimination within a given community.[45] It does not look at the predicament of a society, but at the predicament of the individual within a society. As a consequence, it tends toward

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[41] *Sagharichi, Mojgan v. M.E.I.* (F.C.A., no. A-169-91), Isaac, Marceau, MacDonald, August 5, 1993, at 2. See also Hathaway, at note 38 at 1.2.

[42] *Ibid.*

[43] Hartling, P, "Concept and Definition of "refugee" – legal and humanitarian aspects" (1970) 48 NITR (1979) 130.

[44] Hathaway, above note 38 at 1.2. The 1951 definition is a product of a number of political and normative compromises, ranging from particular political values to a desire to control numbers of refugees. See Gunning, above note 8 at 51; also see Kristen Walker, "Defending the 1951 Convention Definition of Refugee, (2003) 17 Georgetown Immigration Law Journal 583.

[45] In *Canada (A.G) v. Ward*, the Supreme Court of Canada agrees that "underlying the [1951] Convention is the international community's commitment to the assurance of basic human rights without discrimination…" [1993] 2 S.C.R. 689, at 733.

an exclusion of those who face indiscriminate threats which are unrelated to the five enumerated grounds of persecution.[46]

Unlike the 1951 definition, the OAU Convention as a whole and the extended definition in particular, represents a communitarian philosophy of asylum which focuses on the nature of the community.[47] The African socialists who founded the Organization of African Unity brought with them a vision which, while not necessarily hostile to liberal human rights, was more often concerned with "pressing issues, such as unity, non-interference and liberation."[48] This communitarian aspect is evinced in the absence of individual characteristics in the definition and in the OAU definitions focus on security and macro-political phenomena: rather than focusing on the "persecuted individual", it looks to a series of events which disrupt society as a whole and which present a generalized threat to an indefinite class of people. This is a departure from the basic normative (and perhaps ontological) underpinnings of the 1951 Convention. Instead of premising itself on the existence of a relatively stable political community, the OAU definition is premised on the position that the community itself may constitute the threat. The sum effect is that this africanized notion of asylum is cohered around the quality of the community, instead of around the quality of the individual.

3.2 An indeterminate cause of flight

The OAU refugee definition is also said to stand in contradistinction to the 1951 definition because it lacks the quality of deliberateness found in the 1951 definition. Under the 1951 definition, an asylum-seeker must show that they face persecution by virtue of being deliberately targeted because of her race, nationality, religion, membership in a social group, or political opinion.[49] In this way, the definition requires an element of deliberate targeting of an individual on the part of the agent of persecution.

The OAU definition is said to be "qualitatively different [from the 1951 Convention] for it considers situations where the qualities of deliberateness and discrimination need not be present."[50] Rather than implying a particular agent of persecution, the extended definition acknowledges "that fundamental forms of abuse may occur not only as a result of the calculated acts of the government of the refugee's state of origin, but also as a result of that government's loss of authority."[51] As a consequence,

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[46] The exclusion of indiscriminate threats is a matter of debate. Kalin argues that the 1951 Convention read against international humanitarian law covers many of the situations found in the OAU Refugee Convention, but concedes that the 1951 definition still requires "a showing of a well-founded fear of persecution on the part of every applicant". Walter Kalin, "Refugees and Civil Wars: Only a Matter of Interpretation," (1991) 3 IJRL 451

[47] Communitarianism is a philosophy which emphasizes the community over the individual. The community is seen as shaping the individual, and individual interests are sometimes subordinated to those of the larger community, either by constraining individual rights or by giving corresponding duties. More generally, however, communitarianism tends to focus on economic, social and cultural rights, rather than individual rights.

[48] El-Obaid Ahmed El-Obaid and Kwado Appiagyei-Atua, "Human Rights in Africa - A new perspective on linking the Past to the Future" (1996) 41 McGill L.J. 827.

[49] Lorne Waldman, *The Definition of Convention Refugee*, (Toronto: Butterworths, 2001) at 8.244 to 8.251 [Waldman].

[50] Arboleda, "Pragmatism", above note 10 at 195. See also Arboleda, "Cartagena", above note 37 at 94.

[51] Hathaway, above note 38 at 1.4.3.

the definition includes "even accidental situations not necessarily based on deliberate State action [where] the source of danger need not be the actions of a State or its agents."[52] The generality of the threat is furthered by the fact an event may occur "in either part or the whole" of an asylum-seeker's country of origin.

Yet there is some sense of specificity captured by the definition's four events: external aggression, occupation, foreign domination, and events seriously disturbing public order. Although many of these terms "lacked firm definition under international law" [53] at the time the Convention was drafted, the act of selecting particular events suggests a conscious effort to place limits on the scope of the definition. Few have been interested in discussing either the scope or the limits entailed by these events, which remains perplexing when faced with notions as vague as "events disturbing public order". Instead, most agree with Rwaleimera that the clause "is designed to cover a variety of *man-made* conditions which do not allow people to reside safely in their countries of origin."[54] While this is a testimony to the definition's flexibility, it does little to assist in interpretation: is a riot sufficient to disrupt public order or would only a civil war suffice? There is something arbitrary about this simultaneous celebration of broadness next to an exclusion of non-man made events such as natural disasters.[55] After all, a plain reading does not immediately indicate why an earthquake or flood does not seriously disrupt public order.

The fact that thirty years have passed without articulating the meaning of these OAU terms raises some troubling concerns. First off, the failure to provide an interpretive framework may ultimately undermine the broadness and the flexibility of the definition by limiting the situations in which it could be applied. Although many of the revolutionary conditions that led to the inclusion of the OAU events no longer exist, Okoth Obbo is astute in remarking that they could "be viewed as vessels still possessed of the capacity for the legal transcription of Africa's refugee realities."[56] It would not, for example, be a stretch to apply occupation to Congo which remains "divided into territory controlled by the Government and territories controlled by several rebel factions, Ugandan troops, ethnically based militias and other armed groups."[57] Nor would it have seemed wrong to apply it to South Africa's long occupation of Namibia, an occupation which was confirmed illegal in an advisory opinion of the International Court of Justice.[58]

State practice also indicates why a legal interpretation is necessary. The limited evidence suggests that States take relatively restrictive approach to the definition. The official position of the South African government is that the OAU Convention only

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[52] Okoth-Obbo, above note 21 at 112.

[53] Arboleda, "Pragmatism", above note 10 at 195.

[54] M.R. Rwelamira above note 35 at 558. See also Francis Deng. "Dealing with the Displaced: A Challenge to the International Community', Global Governance" (1995) 1 Global Governance.

55 For exclusion of natural disasters from the OAU definition see Gregory S. McCue. "Environmental Refugees: Applying International Environmental Law to Involuntary Migration." (2003) 151 Geo. Int'l Evntl. L. Rev. at 174 - 179; David Keane, "The Environmental Cause and Consequences of Migration: A search for the Meaning of 'Environmental Refugees." (2004) Winter Geo. Int'l Evntl. L. Rev. 216.

[56] Okoth-Obbo, above note 21 at 116.

[57] U.S., Department of State Reports, Bureau of Democracy, Human Rights and Labor, Country Reports on Human Rights Practices – 2003. February 25, 2004 <http://www.state.gov/g/drl/rls/hrrpt/2003/27721.htm>

[58] Legal Consequences For States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970) Advisory Opinion of 21 June 1971.

applies to African asylum seekers despite the fact the definition uses the words "every person". The result is "the overwhelming rejection of non-African applicants."[59] South Africa has also favoured "a particular reading of the OAU definition whereby the properly recognizable refugee…emerges as an African victim of generalized violence."[60] Similarly illustrative was Cote d'Ivoire's restrictive treatment of asylum-seekers fleeing the Liberian civil war which demonstrated "a narrower application of the "refugee" definition called for by the 1969 OAU Convention."[61] What appears most lacking in scholarship is a threshold for applying the extended definition. Is the Convention only applicable to African refugees who come from countries where civil war and generalized violence are endemic? Or is it possible that other wide scale violations of human rights may also fall within its ambit?

3.3 A prima facie group definition

The final area of a "consensus" is what might be termed the *prima facie* group thesis. The conventional wisdom surrounding the extended definition is that it introduces "a process of group determination of refugee status on a *prima facie* basis, as compared with the individual status determination procedures under the 1951 Convention."[62] Much of the thesis can be explained as an effect of practice. The majority of state[63] and UNHCR[64] experience with the OAU definition has been in the context of mass influx situations. Group status determination on a *prima facie* basis is generally used when a large scale movement of people take flight because of a specifically disruptive event.[65] In these situations, individual status determination is usually impracticable and largely irrelevant given the similarity of the claims.[66]

The relationship between the group status and the extended definition is clear: the disruptive events described in the OAU refugee definition tend to prompt large scale

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[59] Lee Anne de la Hunt. "Refugee Law in South Africa: Making the Road of the Refugee Longer" US Committee fro Refugees, <http://www.refugees.org/world/articles/safrica_wrs02.htm> [De la Hunt].
See also Ingrid van Beek, "Prima Facie Asylum determination in South Africa: A description of Policy and Practice" in Jeff Handmaker et al., ed., Perspectives on Refugee Protection in South Africa, Lawyers for Human Rights, <http://www.ihr.org.za/projects/refugee/publications/perspectfull/ingrid.htm> [van Beek].

[60] Anais Tuepker, "On the Threshold of Africa: OAU and UN Definitions in South African Asylum Practice," (2002) 15 Journal of Refugee Studies 409.

[61] Jennifer L. Turner. "Liberian Refugees: A Test of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa." 1994 (Spring) Geo. Immigr. L.J. Georgetown 283 [Turner].

[62] Richard Carver and Guglielmo Verdirame. Voices in Exile: African refugees and freedom of expression. (2001), ARTICLE 19, Global Campaign for Free Expression at 1.1. <http://www.article19.org/docimages/1008.htm>
See Walter Kalin, "Flight in Times of War" (2001) 83 International Review of the Red Cross, at 637-638.; see Turner, above note 61, at 295.

[63] See generally African Exodus, above note 4; also see Jackson, above note 15 at 195 to 211.

[64] This conclusion is based on interviews conducted by the author with the Legal Officer of UNHCR's Refugee Status Determination at RO Cairo and in email exchanges with a Senior Protection officer at the Division of International Protection (DIP) Geneva. The UNHCR's mandate includes the OAU definition. See G. Goodwin-Gill, "Refugees: The Function sand Limits of the Existing Protection System", in A. Nash, ed., Human Rights and the Protection of Refugees under International Law, co-published by the Canadian Human Rights Foundation and the Institute for Research on Public Policy, Montreal, 1988,at 150.

[65] Ivor Jackson, above note 15 at 3.

[66] Ibid.

movements of people, meaning that the group approach is often quite reasonable. Yet the fact that the definition is well suited to group situations does not mean that it was intended to be applied to groups. Okoth-Obbo is correct in remarking that the thesis "is an abuse and misuse of the intentions and purposes from which [the OAU Convention] arose."[67] First, it attributes motives to the drafters which are neither apparent in the draft history nor in the Convention itself. There is no mention of group status determination or *prima facie* recognition in the OAU Convention. In fact, two of the earliest drafts – the Kampala Draft of 1964 and the Addis Ababa Draft of 1965 - contained specific provisions for the *prima facie* application of the 1951 definition. While this could suggest an intention to create a "group definition", it seems telling that it was omitted from the drafts that followed and from the final Convention.[68]

The second problem is that the thesis stems from a more generally incorrect understanding of two issues: group status determination on the one hand and *prima facie* recognition on the other.[69] The so-called *prima facie* group status concept is said to be an incorrect merging of "a legal question (refugee status), a methodology for decision-making (prima facie), numeric factors (groups) and the imperative to save lives."[70] *Prima facie* recognition refers to "the *provisional* consideration of a person or persons as refugees without the requirement to complete refugee status determination formalities [enabling] an urgent decision to be made without this being decisive of the question of their refugee status as such."[71] Group status determination, on the other hand, "refers to a legal classification and not a procedure."[72]

Finally, the *prima facie* group thesis also gives tacit recognition of a practice, which, while often necessitated by the exigencies of circumstance, can undermine refugee protection. The association of the group status determination with the OAU Convention has led to a misconception that it proposes "an entirely different kind of refugee regime that [gives] fewer rights to more refugees."[73] This misconception has led to a legal dichotomy between individually recognized, urban, 1951 Convention refugees, with broad guarantees and poor, rural, OAU group refugees with few guarantees. *Prima facie* recognition has also been associated with a number of serious protection problems. In Rwanda, it "masked the fact that among those granted protection were persons who were involved in the massacre and killing of others as well as in planning and conspiracy to commit genocide."[74] While these problems cannot be solely attributed to the OAU Convention, it still seems pernicious to advocate an interpretation which tends to undermine refugee rights.

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[67] Okoth-Obbo above note 21 at 117.
[68] See section 2 above.
[69] The UNHCR Handbook, at para. 44. provides an example of this merging of the group and *prima facie* concepts.
[70] Okoth-Obbo above note 21 at 117.
[71] *Ibid.*
[72] *Ibid.*
[73] De la Hunt, above note 59 ; aee also Deborah Perluss and Joan F. Hartman, "Temporary Refuge: Emergence of a Customary Norm" (1985-1986) 26 Va. J. Int. 590.
[74] African Exodus, above note 5; see also "The Refugee Crisis in Southern and Central Africa" (1999) Global Dialogue: Institute for Global Dialogue, 4.1. < http://www.igd.org.za/pub/g-dialogue/africa/refugee.html>

4. Deconstructing the extended definition

The discussion has so far shown that the extended definition raises a number of serious interpretive problems ranging from assumptions about its nature to more specific concerns about its content. The obvious response may be that the definition ought to be subjected to some kind of legal analysis. But it is useful to also ask if this is desirable. After all, there is evidence that the framers "gave secondary consideration to the strict legal meaning of its terminology and to case law."[75] Like the 1951 Convention, the OAU Convention is a legislative treaty and may have intentionally been left vague to capture a myriad of unforeseen circumstances.[76] Perhaps an overly legalistic approach would be as artificial as it is antithetical to the OAU Convention's humanitarian tone.

The only response that can be given is that a principled legal approach may be an antidote to a tendency toward narrowing the definition. Since at least the 1980s, Africa's "open door" asylum policy has shifted to a more restrictive approach to refugees.[77] This trend has already been visible in the application of the OAU Convention in countries such as South Africa.[78] A narrowing construction has also been visible in the reading of the 1951 refugee definition.[79] Thus, while philosophically undesirable, a legal interpretation may help prevent the adoption of a narrow construction.

Accepting that interpretation is necessary, the interpreter is nevertheless faced with a number of formidable obstacles. Prominent among these are a lack of case law[80], limited evidence of state practice, and a near absence of *travaux preparatoires*. Treaty interpretation also poses its own set of difficulties. According to the Vienna Convention on the Law of Treaties[81], interpretation should begin with the text and only then proceed to supplementary sources of interpretation.[82] The text should be read 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."[83] And any interpretation should give effect to the intentions of the drafters as evidenced by the

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[75] *Ibid.*; Also generally see Holburn, above note 13.
[76] The distinction is made between law-making and contractual or dispositive agreements, which set up more specific regulatory frameworks or involve discrete transactions. As Sitaropoulos notes, the characteristic element of treaties like the 1951 Convention is that they implicate "the will of various states upon a central question of general concern." Sitaropoulos, above note 34 at 95.
[77] Bonaventure Rutinwa, "The end of asylum? The changing nature of refugee policies in Africa."(May 1999) New Issues in Refugee Research, Working Paper No. 5, 8.
[78] See above, section 3.2.
[79] Dennis MacNamara and Guy Goodwin-Gill. "UNHCR and International Protection," (1999) The Refugee Study Centre, Working Paper #2, 7-8 < http://www.rsc.ox.ac.uk/PDFs/workingpaper2.pdf>.
[80] A number of human rights groups confirmed that South Africa has yet to hear any cases dealing with the application or interpretation of the OAU refugee definition.
[81] *Vienna Convention on the Law of Treaties*, 115 UNTS 331 ["Vienna Convention"]. The principles of interpretation in the Vienna Convention were held to be part of customary international law by the International Court of Justice in *Libya v. Chad* case. ICJ Reports (1994), p.4, at para. 41. They should therefore be applicable to the interpretation of the OAU Convention.
[82] Article 32 of the Vienna Convention states that recourse to prepatory work should only be made when an interpretation made in accordance when interpretation leaves a meaning "ambiguous or obscure" or leads to a result which is "manifestly absurd or unreasonable." For discussion on preparatory work see Ian Brownlie, *Principles of Public International Law*. 4th ed., (Oxford: Claraden Press) at 628 [Brownlie].
[83] Vienna Convention, above note 80, at Article 31(1).

text.[84] Even these principles have their limitations. The Vienna Convention is so all embracing that the interpreter is left able to hang his hat nearly anywhere he will. Equally difficult are chimerical notions like the drafters' intentions, especially "intentions" that emerge from a treaty between 43 states. This is not to say that interpretation is impossible, but rather to alert us to certain limits and to remind us that interpretation is more art than science.

> The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

4.1 The African refugee regime: object and purpose

As a preliminary note, it is worth briefly identifying the object and purpose of the OAU Convention. The historical review in section 2 suggests that the object and purpose is threefold: first, it is to ensure peace and security between members of the Organization of African Unity (now the African Union); second, it is to complement the 1951 Convention; and third, it is to meet the specific needs of people displaced as a result of the fundamental disruption of peace and tranquility within their communities. Because this is a humanitarian and protection oriented document, it will be read purposively in the spirit of these objects.

4.2 Field of application: "Every person" or "Every African"?

The first issue to consider is the OAU Convention's scope of application. Although some states take the view that it only applies to Africans, no arguments have been raised to explain this reading. Still, there is some basis for the position. To begin, the OAU Convention's object is to meet the *specific needs of African refugees* and to act as an "effective regional complement" to the 1951 Convention. These references may suggest a conscious intention to limit its territorial application to Africa. Moreover, the Convention's focus on macro-political relations is premised on trade-offs between member-states; that is, the Convention not only grants rights, but also entails corresponding duties on the part of its signatories. This reciprocity could indicate an intention to limit its application to refugees coming from the territories of contracting states.

Notwithstanding these reasons, the more compelling line of argument still appears to lead to an inclusive reading. First, the ordinary meaning of "every person" does not suggest that it should be read as "every African". "Every person" is an inclusive term,

[84] Anthony Aust. *Modern Treaty Law and Practice.* (United Kingdom: Cambridge University Press, 2000) 188 [Aust]. These principles have also been affirmed in the context of international refugee law by the UNHCR's Executive Committee when it stated that interpretations of refugee instruments should be made "in a manner consistent with their spirit and purpose." EXCOM General Conclusion on International Protection, 1995, included in A/50/12/Add.1 para. 19(e), p.8.

which, as de la Hunt remarks, "ought to apply universally and equally to all applicants, regardless of their country of origin."[85]

Second, a narrow construction is inconsistent with the object and purpose of the Convention. The Convention seeks to extend asylum to displaced persons, not to deny it. It is also intended to act as a complement to the 1951 Convention and should be read to have the same universal scope of application. Given that the universally applicable 1951 definition is included in the OAU Convention, the extended definition should be construed as though it were also universally applicable. To construe the definition otherwise would create two distinct classes of refugees within one Convention.

Third, the draft history does not indicate an intention to limit its application to African asylum-seekers. For the most part, the drafts simply replicated the universally applicable language of the 1951 definition. And when changes were made, the drafts used the terms "a person"[86] or "those persons."[87]

Finally, adopting an inclusive construction is more consistent with refugee law in general. It is generally accepted that "presence within State territory is a juridically relevant fact sufficient in most cases to establish the necessary link with authorities."[88] This principle has also been affirmed by the African Commission's reading of the *African Charter on Human and Peoples' Rights,* which includes the grant of asylum among its protected rights.[89] In *Rencontre Africaine pour la Defense des Droits de l'Homme vs. Zambia*, a case concerning the mass expulsion of some 517 West Africans from Zambia, the African Commission confirmed that the Banjul Charter "imposes an obligation on the contracting state to secure the rights protected in the Charter to all persons within their jurisdiction, nationals or non-nationals."[90] The African Commission based this finding on a reading of article 2 of which guarantees that "every individual" is entitled to the rights contained therein.

Canadian refugee law suggests a similarly inclusive reading. In section 7 of Canada's *Charter of Rights and Freedoms* it is stated that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[91] In *Singh* v. *Canada (Minister of Employment and Immigration)*[92], the Supreme Court of Canada held that the term *everyone* included "every human being who is physically present in Canada

85 de la Hunt, above note 69.

[86] See refugee definition proposed at the Asian-African Legal Consultative Committee at its Eighth Session in Bangkok 1966. UNHCR Collection of International Instruments concerning Refugees and Displaced Persons, 1995, Vol II, p. 10.

[87] See refugee definition in the Report of the Addis Ababa Draft, above note 23, at para. 83. See also Administrative Secretary General's Report which uses the term "every person". CM/228.

[88] Brownlie above note 82 at 119.

[89] African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986) [Banjul Charter]. Article 12(3) states "Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions."

[90] African Commission on Human and Peoples' Rights, Communication No. 71/92, (1996), at para. 22.

[91] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11 [Charter].

[92] *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422, 58 N.R. 1 ["Singh"].

and by virtue of such presence amenable to Canadian law."[93] Although *Singh* dealt with the issue of procedural guarantees, the critical issue was whether refugees, as non-citizens, fell within the meaning of "everyone". The Court held that they did.

In sum, an inclusive reading of the extended refugee definition is a more consistent interpretation than an exclusive reading. While it is unlikely that this will lead to an influx of asylum-seekers from outside the Africa, it is still relevant to a principled application of the extended definition.

4.3 The enumerated events: Specifying the scope and the limits

The uniqueness of the extended definition very much depends on the four enumerated OAU events. These can be loosely described in terms of two categories: the first category is war-like phenomena – external aggression, occupation, and foreign domination - which can be understood with reference to existing humanitarian law; the second category of "events seriously disturbing public order" is broader and must be developed with more care and detail.

External aggression, occupation, and foreign domination

The inclusion of external aggression, occupation and foreign domination was likely prompted by the violent territorial conquests of Africa and more general humanitarian concerns.[94] In some respect, the inclusion of these events is somewhat anomalous in a document which ostensibly seeks to depoliticize the grant of asylum. Few labels could have a more overt political implication than aggressor, occupier or foreign dominator. This political element may explain why these terms have rarely been applied in spite of their continued relevance to today's refugee problems.[95]

Political difficulties aside, the interpretive issues raised by this category pose less controversy. Aggression was likely included because of its relationship to the prospect of imperial expansion. Although there is some debate on its meaning, two principal sources provide useful interpretive assistance: first, aggression could be applied by virtue of a declaration of the United Nations Security Council. This occurred when UN Security Council, "acting under Articles 39 and 40 of the Charter of the United Nations" condemned the "Iraqi invasion of Kuwait."[96] The second source is the widely accepted definition of aggression as the "use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition."[97]

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[93] Ibid., at para. 35..

[94] See Arboleda, "Pragmatism", above note 10 at 195.

[95] None of the publicly available evidence suggests that these terms have ever been used; however, interviews with UNHCR staff in Cairo confirmed that "occupation" has been used in Kenya in assessing refugee claiming coming from the Democratic Republic of Congo.

[96] S.C. res. 660, 45 U.N. SCOR at 19, U.N. Doc. S/RES/660 (1990).

[97] Gen. Ass. Res. 3314 (XXIX), 29(1) *R.G.A.* 142, 144 (1974). Although there is some debate as to the universality of this definition, the International Court of Justice held, in the Nicaragua Case, that it was the mirror of customary international law. *Case concerning Military and Paramilitary Activities in and against Nicaragua* (Merits), [1986] *I.C.J. Rep.* 14, 103. Also see Yoram Dinstein. *War, Aggression and Self-Defence,* 3[d] ed. (United Kingdom: Cambridge University Press, 2001) at 114-20.

Occupation is defined by an even clearer humanitarian law standard. The earliest definition of occupation is found in Article 42 of the Annex to the 1899 Hague Convention No. IV *Respecting the Laws and Customs of War on Land.* It states that "a territory is occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."[98] A second definition is found in Paragraph 2 of Article 2 of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War: "The Convention […] shall apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."[99] Of these two definitions, the Hague definition is possessed of much stricter requirements and would be more relevant to conditions of formal war.[100] The Geneva Convention definition is more germane to refugee problems in Africa because it focuses on *de facto* control of territory, whether occupation is "partial or total occupation"[101], and "even if a state of war is not recognized."[102]

Foreign domination is the most ambiguous of the first category of events. The term recurs in a number of international documents and declarations, few of which indicate a precise meaning. Its place in other documents suggests that it was included as a reference to colonialism. Most telling is the 1967 OAU Council of Minister Resolution on the Problem of Refugees in Africa which "appeals to countries adjacent to African territories under *foreign domination* to afford these refugees transit facilities, temporary residence and travel papers."[103] This is a fairly clear reference to peoples struggling against colonialism. Foreign domination is also used in the Banjul Charter[104] and in a number of UN Resolutions[105], all of which suggest an implicit reference to colonial or colonial-like situations.

One may also speculate that foreign domination was included because of a concern that aggression and occupation would not capture the legal status of a colonial territory. Colonial expansion was "not initially analyzed as an infringement on the conquered state's Sovereignty." In a colonial state, the metropolitan government is vested with sovereignty, whereas a fundamental aspect of occupation is that the occupied territory retains its sovereignty.[106] Aggression faces similar problems since once a territory is conquered and under the sovereign control of

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[98] 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land, 26 Martens Nouveau Recueil (ser. 2) 949, 187 Consol. T.S. 429 (entered into force Sept. 4, 1900) at art. 42.

[99] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, (entered into force Oct. 21, 1950) art. 2, para. 2.

[100] Leslie C. Green, The Contemporary Law of Armed Conflict, 2nd ed, (United Kingdom: Manchester University Press), at 256 [Green].

[101] Ibid.

[102] Commentaries to the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, International Committee of the Red Cross, <http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/5aa133b15493d9d0c12563cd0042a15a?OpenDocument> [ICRC Commentaries]..

[103] CM/Res. 104 (IX) 1967.

[104] Banjul Charter, above note 93, art. 20(3): "All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic, or cultural."

[105] Foreign Domination is mentioned in a recent UN General Assembly resolutions on the activities of mercenaries that refers to "peoples struggling against colonialism, racism and apartheid and all forms of foreign domination." A/RES/44/81 8 December 1989

[106] See Green, above note 100 at 257.

another country it is no longer an aggressor *per se*.[107] Strictly speaking, occupation and aggression require the interaction of two sovereign powers, which may have prompted the OAU Convention's drafters to include the broader concept of foreign domination.

Events seriously disturbing public order

The second category of events seriously disturbing public order arguably has a function comparable to a "particular social group" in the 1951 definition; that is, it acts as a basket clause capturing a generic set of refugee producing situations. The extent to which this expands the refugee definition remains controversial. While some take the view that it includes all man-made disasters, others maintain that it provides "the necessary flexibility to include even victims of ecological changes such as famine and drought, which remain among the most challenging situations on the continent."[108] The legal basis for either interpretation is unclear. What does seem clear is that the clause is not infinitely variable and indicates both a quantitative and qualitative element.

The OAU Convention's text suggests that there is an objective, quantitative element, captured by the terms "seriously disturbing". Although "public order" has a very particular meaning in the OAU Convention, the legal issues raised by disturbances have a long history in common law jurisdictions, particularly in relation to breaching or disturbing the King's peace.[109] In *R v. Lohnes*, for example, the Supreme Court of Canada considered what it meant to disturb or to create a disturbance, noting that a disturbance "may be something as innocuous as a false note or a jarring colour [or] at the other end of the spectrum are incidents of violence, inducing disquiet, fear and apprehension for physical safety."[110] The Supreme Court reasoned that the test was objective because the essential concern was "public forum disorder" and not an individual's subjective, emotional state. To determine when a disturbance had taken place involved weighing "the degree and intensity of the conduct complained of against the degree and nature of the peace which can be expected to prevail in a given place at a given time."[111]

The Supreme Court's reasoning in *Lohnes* should apply to the OAU definition. By placing "disturbance" alongside "public order", the Convention's text suggests that it is concerned by disturbance in the public context. And by including the term "seriously", there is an indication that the gravity of the harm must be greater than emotional distress. Consequently, the test should be an objective assessment which considers the gravity of the harm in relation to what can normally be expected of public order.

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[107] Jenik Radon, "Balance of Power: Redefining Sovereignty in Contemporary International Law", 40 Stan. J. Int'l L. 199. Also see Antony Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law",(Winter 1999) 40 Harv. Int'l L.J. 1 49-52.
[108] Rwelamira, above note 35, at 558.
[109] It sometimes even referred to as "the central concept of our public order law." A.T.H. Smith, "Breaching the Peace and Disturbing the Public Quiet" (1982) P.L. 213. Also see Jackie Esmonde. "The Policing of Dissent -- The Use of Breach of the Peace: Arrests at Political Demonstrations" (2002) 1 J.L. & Equality.
[110] *R. v. Lohnes*, [1992] 1 S.C.R. 167, at para. 7 [*Lohnes*].
[111] *Ibid*.

What remains is the more important issue of determining the quality of the harm. This is to be found in the concept of "public order". Public order is a technical legal concept which recurs in several treaties, most notably in Article 2 and 32 of the 1951 Convention.[112] There are two reasons suggesting that it was intended to be read in the technical sense in the 1951 Convention: first, the final draft of the OAU Convention substituted "internal subversion" with "public order" because the former was considered too ambiguous.[113] This suggests an intention to use the term in its technical sense. And second, because the OAU Convention is the complement to the 1951 Convention, and because *public order* appears in both instruments, it seems reasonable to give the terms the same meaning.

That said, public order is not a rigid formula but must be contextualized. Its place in the OAU Convention is probably more akin to its role in article 32 of the 1951 Convention which permits expulsion of refugees "on the grounds of national security or public order."[114] In the 1951 Convention's *travaux preparatoires*, public order was intended to be a reference to acts prejudicial to the "peace and tranquility of society at large"[115] and was imbued with a broad sense of a threat to state authority. As Grahl-Madsen remarks, "it takes a rather extraordinary act to disturb the existing state of affairs."[116] Thus, in approaching public order in the case of explusion, the "common criteria seems to be that public order is at stake only in cases where a refugee *constitutes a threat to an uncertain number of persons carrying out their lawful occupations (habitual criminals, wanton killers)*, *or to society at large, as in the case of riots and unrests, or traffic of drugs."*[117]

But public order is not only used in the context of expulsion, it "may also demand respect for human rights as an element of the exercise of the public authority."[118] It demonstrates a rare area of reciprocal interest between an individual and the state.[119] As Sperduti writes :

> Among the laws and principles of public order found in every legal order, there are certain which are based on universal concepts of justice and civilization, for example, the prohibition of slavery on the one hand and respect for the dignity of human personality on the other; their

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[112] For other examples see International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976) at art.12(3), 14(1), 19(3)(b), 21, 22; also see Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), at art. 29.
[113] See above, section 2.
[114] 1951 Refugee Convention, above note 7 at art.32.
[115] Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951, Articles 2 – 11, 13-37* at art. 2, 32. Division of International Protection of the United Nations High Commissioner for Refugees, 1997, at art. 32, 130, para. 6. (Kims/Refworld) [Atle Grahl-Madsen].See also *The Refugee Convention, 1951: The Travaux Preparatoires Analyzed with a Commentary by Dr Paul Weis,* art. 2, 32 (Kims/Refworld) [Weis, Commentaries].
[116] Grahl-Madsen, above note 115.
[117] Ibid.
[118] A.C. Kiss, "Permissible limitations on rights," Henkin, L. ed., *The International Bill of Rights- The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981) at 301.
[119] *Ibid.*

appropriate title is consequently that of laws and principles of international public order.[120]

Seen in this light, public order is a concept that looks to the basic standards governing the state in its relation to the community and its individual members.

The question this raises is how to characterize the minimum standards of "public order". To begin, we can look to a variety of more self-evident standards. Non-international armed conflict could be called the first threshold and appears to be the main interpretation made by states.[121] By definition, non-international armed conflict is a situation where peace and tranquility no longer exists, exclusive control of territory is lost, and society at large is threatened. Interpretive assistance can be found in humanitarian law, specifically, in Article 3 Common to the Geneva Conventions of 1949 and Additional Protocol II.[122]

On a lower threshold are internal disturbances and tensions. Article I(2) of Protocol II to the Geneva Conventions states: "This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."[123] Although these were excluded from the purview of the Geneva Conventions, the protection of refugees is "particularly tenuous in situations of internal disturbances and tensions."[124] Disturbances and tensions are characterized as situations of some seriousness and duration which are a threat to the state authority or to indeterminate numbers of people.[125] Disturbances are said to occur when "the state uses armed force to maintain order"[126] whereas internal tensions occur when "force is used as a preventive measure to maintain respect for law."[127] In either case, disturbances and tensions fall within the definition because they occur on a sufficiently wide scale and because they violate a core set of human rights which fundamentally undermines the peace and tranquility of a society at large.

The final threshold may be found in situations characterized by the widespread violation of the fundamental human rights. Events seriously disturbing public order does not appear to cover any situation in which human rights are violated. The clause is self-limiting through the quantitative and qualitative elements described above. However, it does suggest certain principles inherent to the definition as a whole. Within all of the events - aggression, occupation, foreign domination – is an

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[120] Guiseppe Sperduti, "Les lois d´application nécessaire en tant que lois d´ordre public," Revue Critique de Droit Internationale Privé N° 66, 1977, 257-270.

[121] See above section 3.2.

[122] *Protocol II -- Relating to the Protection of Victims of Non-International Armed Conflicts*, 1125 U.N.T.S. 609, (entered into force Dec. 7, 1978)[Protocol II] . Additional Protocol II defines Non-international armed conflict as "armed conflicts which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."

[123] Ibid., at art. 1(2)

[124] Sadako Ogata, "Refugees: A Multilateral Response to Humanitarian Crises," (1992) Institute for International Studies, Berkley, at 4.

[125] Commentaries to Protocol II -- Relating to the Protection of Victims of Non-International Armed Conflicts<http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/15781c741ba1d4dcc12563cd00439e89?OpenDocument> [ICRC Commentaries].

[126] *Ibid.*,at 4477

[127] *Ibid.*, at 4476.

underlying concern about a substantial disruption to the community as a whole and to the basic principles that ought to govern relationships within a given community. To seriously disturb public order should be seen as event-type involving violence or threats against an indeterminate number of people or to society at large.

Not surprisingly, this raises the question of how to characterize these fundamental elements of peace and tranquility. The best answer appears to be found in the fundamental principles of humanity: the core set of human rights from which no derogation is permitted.[128] The most widely accepted statement of these core rights is found in the Human Rights Committee's General Comment on States of Emergency which specifies "the minimum set of human rights which would apply to everyone in all situations [and which] is clearly not limited to situations of internal emergency."[129] The rights include:

- The right to life
- The prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent
- The prohibition of slavery, slave-trade and servitude
- Prohibition of imprisonment because of inability to fulfill a contractual obligation
- The principle of legality in the field of criminal law, i.e. the requirement of both criminal liability and punishment and non-retroactivity
- Recognition of everyone as a person before the law
- Freedom of thought, conscience and religion

This list of peremptory human rights norms has been affirmed by the International Law Commission as also including the "prohibition of aggression and human rights and humanitarian law norms such as the prohibition of genocide, slavery, racial discrimination, crimes against humanity, and torture and the right to self-determination."[130] Although not limited to these rights, this statement is intended to

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[128] See generally Terayay Koji, "Emerging Hierarchy in International Human Rights and Beyond : From the Perspective of Non-Derogable Rights" (2001) 12 EJIL.

[129] Promotion and Protection of Human Rights: Fundamental Standards of Humanity. Report of the Secretary-General submitted pursuant to Commission on Human Rights decision 2001/112. E/CN. 4/2002/103, 20 December 2001, para.2. [Secretary-General Report]. See specifically UN Human Rights Committee, General Comment No. 24, CCP/X/21/Rev.1 [CHR Emergency Comment]. See also Jean-Daniel Vigny et Cecilia Thompson, "Standards Fondamentaux d'humanité: quel avenir?" (2000) 840 Revue internationale de la Croix-Rouge. http://www.icrc.org/web/fre/sitefre).nsf/html/5FZHPY [Vigny & Thompson].

[130] Commentary to article 26, at para. 6, of the Draft Articles of State Responsibility for Internationally Wrongful Acts in Report of the International Law Commission on the work of its fifty-third session, Official Records of the General Assembly, Fifty-Sixth session, Supplement No. 10 (A/ 56/ 10), chap. IV, sect. E.

recognize “that it is often situations of internal violence that pose the greatest threat to human dignity and freedom.”[131]

Looking to the OAU definition, this list of rights can provide us with a flexible framework for analogizing to new situations, which seems more fruitful than listing every potential lower threshold event. Furthermore, because these rights do not rely on treaty obligation, all state and non-state actors are bound to uphold them.[132] Consequently, the position taken here is that the violation of these rights on a sufficiently broad scale is an indication that public order has been seriously disturbed.

The last prominent issue raised by “events seriously disturbing public order” is the exclusion of natural disasters. While this represents an area of rare interpretive consensus, there has been precious little effort at articulating a legal rationale. Most explanations are rather more like statements of preference than legal arguments. The authors of South Africa’s Draft Refugees White Paper, for instance, warn against casting the net so wide as “to include victims of poverty and other social or economic hardships, environmental disaster, or other factors not directly or secondarily recognized in refugee obligations.”[133] Similarly, a report on interpreting “seriously disturbed public order” in the Cartagena Declaration[134] confirms the situations “must be man-made and cannot constitute natural disasters.”[135] But surely more is needed: a plain reading does not immediately suggest the exclusion of natural disasters why an earthquake or flood does not seriously disturb public order.[136]

Nevertheless, the position taken here is that natural disasters should be excluded. To begin, the technical meaning of “public order” suggests a reference to social and political unrest caused by human activities and not by nature. “Events seriously disturbing public order” is a basket clause, and should arguably be read *ejusdem generis*[137] to cover events that share some element that is similar to aggression, occupation, and foreign domination, which are all clearly manmade events.[138] If a natural disaster can be put into legal terms, it is probably best described as *force majeure* or “an event or effect that can be neither anticipated nor controlled.”[139] Unless otherwise stated, a *force majeure* usually considered to be outside of the responsibility of a state and do not therefore give rise to a duty to grant asylum.[140]

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[131] Secretary-General Report, above note 129 at para. 2.
[132] Vigny & Thompson, above note 129.
[133] Draft Refugee White Paper Notice 1122 of 1998, South Africa, July 1998, at para. 2.6. [Draft Refugee White Paper].
[134] Cartagena Declaration on Refugees,1984.
[135] Hector Gros Espiell, Sonia Picardo, Leo Valladares Lanza. “Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America,” (1990) 83 IJRL 96.
[136] Keane, above note 55 at 3.
[137]This maxim of interpretation holds that ““when a general word or phrase follows a list of specific person or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed.” *Black’s Law Dictionary*, 7th ed., *s.v.* “ejusdem generis”. It has been confirmed applicable to treaties (Brownlie, above note 86 at 629).
[138] It should be remembered that events seriously disturbing public order was first and foremost intended to capture subversive activities. This suggests a clear intention to deal with human made threats from human activity. See above section 2.
[139] *Black’s Law Dictionary*, 7th ed., *s.v.* “force majeure”.
[140] Article 23 of the ILC’s *Draft Articles on State Responsibility* states: “The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to

More importantly, however, is the distinction in event types. Disruptions to public order are about breakdowns in human relationships and antagonisms within the community. The OAU Convention's communitarian perspective rests on a belief that the community can become a threat to itself or to the well-being of its members. A natural disaster represents a threat to the community, but rather than coming from within, a natural disaster is an event which sees the community confront collective adversity from the outside. Still, it should be made equally clear that this does not licence a government or non-state agent to use "natural disasters" in pursuit of its own agenda. The definition would seem to capture the effects of a famine caused by state action[141] since this is merely using nature as a tool to a political end.[142]

4.4 Compelled to take flight

The term "compelled" creates a number of difficult interpretive problems, but foremost is the question of its objectiveness. Although compelled is said to be "objective", a plain reading leaves a range of possible meanings. Compelled could refer to the application of force leading to "involuntary" action, as in, 'she was compelled by the wind to take refuge'. Or it could be closer to a subjective preference, as in, "he made a compelling argument". Intuitively, the objective meaning is more plausible but this requires some explanation.

The objective reading takes the term to refer to an irresistible force or constraint and implies a certain level of involuntariness on the part of the actor.[143] There are a variety of reasons that point towards an objective construction: first, it corresponds more closely to the equally authentic French text[144] which uses the term, "obligée"[145]. Second, a reading *noscitur a sociis*[146], that is, in reference to the text associated with it, suggests the objective construction. Compelled is in a distinct causal relationship with the events listed in the definition. The events represent the "irresistible force", which causes an asylum-seeker to take flight. As Deng writes, "the word 'compelled' read in conjunction with the reasons that cause the compulsion, indicates that such a fear or other similar notion is assumed to exist." This is made more evident when read against terms such as "seriously disturb" which clearly imply something more than a subjective choice.

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force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation."

[141] This is illustrated by Article 23 (2) of the Draft Articles on State Responsibility where a state is said to be responsible if:

The situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

The State has assumed the risk of that situation occurring.

[142] In many so-called "natural disasters" man-made factors have caused or aggravated the situation. The Ethiopian famine of the 1980s provides a good example: while the media focused on the drought as the ostensible cause of the famine, the reality was that it was a backdrop to a government supported process of forced land collectivization which was among the primary causes of the death. The great state generated famines such as occurred in the Ukraine or in China provide similar examples.

[143] The oxford dictionary defines the verb "to compel" as 1. *trans.* To urge irresistibly, to constrain, oblige, force: a. a person *to do* a thing (the usual const.). b. a person *to* (*into*) a course of action, etc. c. with *simple object*: To constrain, force. O*xford English Dictionary*, *s.v.* "to compel".

[144] See OAU Convention, above note 1 at art. X(2).

[145] *Convention de l'OUA régissant les aspects propres aux problèmes des réfugies en Afrique*. 1001 UNTS 45 (No. 14691) at art I(2).

[146] This maxim of interpretation which holds that the "meaning of an unclear word or phrase should be determined by the words immediately surrounding it." *Black's Law Dictionary*, 7th ed., *s.v.* "nocitur a sociis".

What an objective construction does not solve is the problem of operationalizing compelled. It does not, for example, explain whether compelled involves an actual application of force or a threat thereof. Nor does it suggest how a decision-maker might conceive of compelled in legal terms. To do so, it is best to draw legal analogies, the clearest of which appears to lie with the criminal defences of necessity and duress.[147] The relationship to these defences is that they use objective tests and "involve situations where a person claims to have been forced by threats" to take certain actions which they otherwise would not.[148] In the case of duress, the threats emanate from a human source, whereas in necessity, the threats tend to originate from "natural sources such as the forces of nature."[149] Aside from these differences, there are a number of shared ingredients relating to causality: first, there is the requirement of serious threat or imminent danger to a person or their family; second, the threat must be imminent, continuous or impending; and third, "the circumstances must be such that a person of ordinary fortitude in the position of the accused would have responded in the manner of the accused." [150] Although this simplifies an area of considerable debate, the criminal law provides a useful framework by suggesting that a person is only *compelled* to do something when faced with a threat of a particular character.

Strictly speaking, the application of these defences to the refugee law context has some limits. The criminal law test is intended to be restrictively[151], whereas the OAU definition is intended to be inclusive and should be read flexibly. Thus, the most practical way of dispelling ambiguity and incorporating the criminal law element may be to simply read the words "threats to lives, liberty or freedom". These are the terms used in the Cartagena declaration which was inspired by the OAU definition.[152] Similar words are used in the UNHCR's mandate question, which asks whether an asylum seeker faces "*serious and indiscriminate threats to life, physical integrity or freedom."*[153] In either case, the conceptual problems are effectively dealt with by reading terms into the definition.[154]

While some might argue that reading in these terms distorts the definition or places unjust limits on its application, threats to life, liberty and security represent relatively flexible categories which cover most situations in Africa. Moreover, they are distinctly related to the OAU events. There must be something about aggression, occupation, domination, or disruption of public order that reasonably compel a person to take flight. Although this may appear to create problems in the face of situations

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[147] The defence of compulsion is not included because it involves situations where the actor has no choice, such as when a persons arm is forcibly directed against another. See Stanley M. H. Yeo, *Compulsion in the Criminal Law,* (Australia: The Law Book Company Ltd., 1990) at p. 25-26 [Yeo].

[148] *Ibid.,* at 25.

[149] *Ibid.*, at 25. Also see J.C. Smith, *Justification and Excuse in the Criminal Law,* (Canada: Carswell and Company, 1989) at 82-84.

[150] For elements of necessity see D O'Connor and P. A. Fairall, Criminal Defences, 3rd Ed, (Ontario: Butterworths, 1996), at p. 111. For Duress see *Ibid*, at 153.

[151] Ibid.

[152] The Cartagena Declaration refers to the "the precedent of the OAU Convention". above note 139 at para. III(3).

[153] See The RSD and Resettlement Learning Programme, " Chapter 1: Elements of Refugee Status Determination," United Nations High Commissioner fro Refugees, at 1-6.

[154] In South Africa's Draft Refugee White Paper it is stated that the OAU definition "should be interpreted to include those who have come to South Africa because their lives, safety or freedom are threatened [by the OAU events]." Above note 133 at para. 2.3. This also suggests that these are the primary concerns underlying the notion of compelled.

such as occupation or foreign domination which may be "stable", there is near universal acceptance that they constitute inherent threats to liberty. A reasonable presumption can be made that the imposition of martial law or the constraints of a racist regime would reasonably compel someone to take flight.

Before turning to the other clauses, it is worth remarking on a final interpretive problem. Unlike the 1951 definition which is phrased in the present tense and incorporates prospective risk assessment,[155] the OAU definition is phrased in the past tense, pointing to a retrospective assessment. The unfortunate result is that a plain reading appears to lead to a technical exclusion of *sur place* claims; a person who is already abroad when an OAU event takes place would not be compelled to leave, but would be *compelled to remain*. This manifestly absurd result clearly runs contrary to the spirit of the Convention. The only resolution that can be offered is that the extended definition should be read in good faith and in a manner that is consistent with the 1951 definition. Since the 1951 definition is included in the OAU Convention and allows for *sur place* claims, the OAU Convention should as well. To do otherwise would lead to the OAU Convention having two categories of refugees within the same document and would run contrary to the OAU Convention's purpose.

4.5 Place of habitual residence

The importance of the clause "place of habitual residence" should not be underestimated. On its face, some may conclude that place of habitual residence is comparable to "habitual residence" in the 1951 definition where it is intended to be "a point of reference for stateless refugee claimants."[156] However, habitual residence is functionally distinct in the OAU definition. The extended definition's test is not whether someone is being compelled to flee from her country of origin, but from the place of habitual residence. This could be seen as a means of distinguishing between certain categories of displaced persons, namely, by focusing attention on those who face danger because of the state of their communities. It can also be viewed as part of the OAU Convention's underlying spirit which seeks to provide a surrogate community for those who are no longer safe in their communities. The implication is that there is a necessary geographic nexus between an OAU event and a person's place of habitual residence.

Accepting this proposition, we are still left wondering what habitual residence might mean. Habitual residence appears in a number of international and domestic legal instruments, but most prominently in the *Hague Convention on the Civil Aspects of International Abduction*.[157] The term is perhaps best understood as denoting a type of relationship or link between an individual and a place. Unlike simple residence, habitual residence implies durable connection which may be "reflected either in the

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[155] See Hathaway, above note 38 at 3.1. See also Waldman, above note 49 at para. 8.102.1.

[156] See Hathaway, at note 38 at 2.5.2; UHNCR Handbook, above note 42, at para. 101-105; see also Waldman, above note 49 at para. 8.360. For Canadian Case law see *Lin, Yu Hong v. M.C.I.* (F.C.T.D., no. IMM-1855-94), Reed, December 12, 1994.

[157] Habitual Residence first appeared in the 1902 Hague Convention on Guardianship and is used widely throughout the *Convention on the Civil Aspects of International Child Abduction*, Oct. 25, 1980 (hereinafter the "Hague Convention") but is no where defined. See *Hague Convention* at <www.hcch.net/e/members/members.html.>

length of stay or in a particularly close tie between the person and the place."[158] As in all types of residence, this can be influenced by a number of factors such as time, culture[159] and age[160].

Although there is no universal standard for habitual residence, a number sources suggest that it is characterized by the following elements: first, habitual residence is a heavily fact based question.[161] Second, in determining habitual residence, regard should be had both to a person's duration of stay and to whether their actions indicate a settled purpose.[162] Third, a settled purpose involves considering a person's attachment to a particular location as evidenced by familial linkages, social and cultural relations, economic factors and other matters related to a person's ordinary mode of living.[163] Finally, a person's intention to habitually reside in a particular place should be given some, but limited weight.[164]

While these may seem like overly academic considerations, there are practical implications. One of the results of including "place of habitual residence" is to create a problem with departure delays. The UNHCR's experience has shown that there are often major delays – even as long as years - between the time when a refugee is compelled to leave her place of habitual residence and the time she arrives in the country of asylum.[165] In the interim period, the asylum seeker may be internally displaced and take up residence in several secondary locations in her country of origin before moving to the final country of asylum. Very often, the choice to leave her country of origin will be triggered by a separate incident which may not amount to persecution or to an OAU event. While in the 1951 definition these delays go to a

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[158] "Comments on Habitual Residence in the European Convention on the control of the acquisition and possession of firearms by individuals (ETS No. 101) <http://conventions.coe.int/Treaty/en/Reports/Html/101.htm>.

[159] The important cultural element of residence has been emphasized by the Supreme Court of Canada in *Corbiere v. Canada*, [1999] 2 S.C.R. 203, where the Court considered the issue of aboriginal residence. Aboriginal residence was also at issue before the United Nations Human Rights Committee in *Sandra Lovelace v. Canada*, where the committee reasoned that residence was fundamental to aboriginal woman's ability to access her community and culture. *Sandra Lovelace v. Canada*, Communication No. 24/1977, U.N. Doc. Supp. No. 40 (A/38/40) at 249 (1983)

[160] See Hague Convention, above note 157

[161] See Rhona Schuz, "Policy Considerations in Determining the Habitual Residence of a Child and the Relevance of Context" (2001) 11 Journal of Transnational Policy 5-8.

162 In the leading U.S. case of Feder v. Evans-Feder, the 3rd Circuit Court held that "habitual residence" was "the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a 'degree of settled purpose.'" 63 F. 3d 217, 227 (3rd. Cir. 1995), at 223. In the leading English case of Regina v. Barnet London Borough Council, Lord Scarman states: "A man's abode in a particular place or country which he has adopted voluntarily and for a settled purpose as part of the regular order of his life for the time being, whether of short or of long duration."[1983] 2 A.C. 309, 343 (H.L. 1982)(Eng.).

[163] In an early effort to standardize habitual residence, the Council of Europe emphasized the need for a durable connection: "in determining whether a residence is habitual, account is to be taken of the duration and continuity of the residence as well as of other facts of a personal or professional nature which point to durable ties between a person and his residence." See Council of Europe, Committee of Ministers, ON THE STANDARDIZATION OF THE LEGAL CONCEPTS OF "DOMICILE" AND OF "RESIDENCE", Resolution 72(1), 18 January 1972, Council of Europe, 1972, Rule No.9 [COE 72(1)].

[164] *Ibid.*

[165] The UNHCR RO Cairo faces this difficulty on a regular basis. In particular, asylum seekers fleeing from the Southern Sudan will often spend months or years in Khartoum or in an IDP Camp before coming to Egypt. The decision to seek asylum in Egypt will often be triggered by a secondary incident. Thus, a recurring problem arose when the secondary event did not meet the OAU definition.

question of credibility[166], in OAU Convention, they go to the core issue of whether someone has been compelled from their habitual residence.

The short answer to the delay problem may be found in the concept of a continuing compulsion.[167] That is the idea that having once fled from her place of habitual residence an asylum-seeker will continue to be compelled so long as the displacement can be causally linked to an initial triggering event. During this time period, an internally displaced person could be characterized as living in a state of transience. The determination of transience lies in the distinction between a *simple residence* and a *habitual residence*. An asylum-seeker can have several "simple residences" as she moves from one place to another after an initial displacement. However, once a new habitual residence has been established, the compulsion will have ceased. Thereafter, the asylum seeker would not be considered a refugee for the purposes of the OAU Convention until a new OAU incident prompts displacement from the second habitual residence.

4.6 In either part or the whole of

The extended definition is significantly broadened by this clause. Its inclusion is probably explained by the inherently chaotic and unstable nature of the OAU events. While the text is relatively clear, it does raise the question as to whether a claimant can be declared a refugee if their flight is prompted by an event taking place in any part of their country of origin. This may initially appear plausible, but when read against the text as a whole, there appears to be a necessary nexus between the asylum-seeker and the OAU event. As stated above, the nexus is created by the fact an asylum-seeker is compelled to leave his *place of habitual residence.* Compelled entails a threat to a person and if an OAU event is too distant it would pose no danger or threat. The term habitual residence also suggests that an event must take place in or near the place of habitual residence. Thus, "in either part or the whole of" does not obviate the need for a geographic connection between an asylum seeker and the compelling event.

The second important aspect of the clause relates to the In-flight Protection Alternative. Although the 1951 definition generally requires a refugee to seek protection in another part of his or her country if protection is available,[168] the In-Flight Alternative is said to be irrelevant to "refugees coming under the purview of [the OAU Convention]."[169] This conclusion may only be formally correct. Reading the definition more broadly suggests that it may entail something akin to an In-Flight Alternative. The OAU definition asks whether someone is compelled to leave his place of habitual residence to seek refuge outside.[170] But what happens when someone

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[166] Waldman, above note 49 at para. 8.39.

[167] The concept of continuing compulsion is attributable to Alistair Boulton, a Resettlement Officer at the UNHCR RO Cairo. However, it does not in any way represent the official policy of the UNHCR.

[168] Goodwin Gill, *The Refugee in International Law, 2nd* ed. (Oxford: Clarendon Press 1996) at 5.2.2 (KIMS/REFWORLD).

[169] UNHCR Internal Flight Alternative Guidelines HCR/GIP/03/04, at para. 5; See also the Michigan Guidelines on the Internal Protection Alternative, at para. 6.

[170] Interestingly, the language does not actually suggest that a person need be outside of her country of origin, but only that she be seeking "refuge in another place outside of his country of origin." However, it should be remembered that the drafters consciously changed the language to include an alienation requirement. See section 2 above.

is compelled from somewhere other than their habitual residence? For example, one can imagine a situation in which a visiting family member, who is habitually resident in another region, might be caught up in an OAU event and be unable to return home. It can reasonably be assumed that so long as the event is unlikely to spread to the part of the country where the person is habitually resident, and so long as return is possible, the person would not be considered an OAU refugee. The result might be an effective in-flight alternative.

5. Conclusion

When the organization of African Unity began work on an African refugee convention, its primary goal was to attach itself to the existing international refugee regime. In the end, the OAU Convention accomplished far more than this limited task. The result was a refugee instrument that has become the cornerstone of protection in Africa. Although many of the drafters saw the OAU Convention as a measured approach to a temporary refugee problem, the past four decades have shown that the "refugee problem" continues to be one of Africa's most important challenges. Moving forward in the 21st Century, the OAU Convention's most important feature may not only be in its reflection of a particular African vision of asylum, but also in its ability to clearly demonstrate the short comings of the 1951 Convention.

The interpretation above demonstrates that the extended refugee definition poses a variety of complex interpretive problems worthy of consideration. While it provides an initial means of conceptualizing some of the more important areas of controversy, any legal interpretation must at most be seen as preliminary. A significant body of research remains to be done. Gathering a more substantial body of state practice would be useful in understanding how States conceive of their legal obligations. It would also be useful to compile a larger body of preparatory documents than are currently available. These efforts will all be relevant so long as the OAU Convention remains the core of refugee protection in Africa.

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