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**The 1969 OAU Refugee Convention and the
Protection of People fleeing Armed Conflict and
Other Situations of Violence in the Context of
Individual Refugee Status Determination**

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I INTRODUCTION

This study analyses the interpretation and application of the regional refugee definition contained in the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa¹ (1969 Convention) in the context of individual refugee status determination (RSD) conducted by States in Africa.² It was commissioned by UNHCR to inform a roundtable on, and the development of international protection guidelines regarding, people fleeing armed conflict and other situations of violence across borders. Given the changes in the causes, character and effects of armed conflict and other situations of violence in Africa since the adoption of the 1969 Convention, the paper is primarily interested in how the 1969 Convention's regional refugee definition is applied by States in individual RSD procedures in the modern context.

The section that follows this introduction describes the study's research methodology. Section three provides a brief background on the 1969 Convention. Section four discusses procedural and substantive aspects of RSD practice of African countries, with a focus on the latter. This includes a consideration of the relationship between the 1969 Convention and its universal counterpart—the 1951 Convention relating to the Status of Refugees³ (1951 Convention)—in African State practice, the relative importance of objective and subjective considerations in decision-making under the 1969 Convention's regional refugee definition and the importance and meaning of the definition's 'events seriously disturbing public order' clause. Section five concludes by summarizing the main trends that emerge from the analysis.

II METHODOLOGY

The research methodology for this study was a desk-based review of primary and secondary sources. Primary sources consisted of, among other things, a questionnaire,⁴ which was distributed with an explanatory covering letter to 35 UNHCR country offices across sub-Saharan Africa. The questionnaire approach was necessary because African refugee decisions are rarely reported, and detailed information on national refugee protection frameworks in Africa is not readily accessible.⁵ The questionnaires elicited information on the legislative or formal legal framework for RSD, in particular with respect to individuals who fled armed conflict and/or

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

² NB: references to Article 1A(2) of the 1951 Convention and to Articles I(1) and I(2) of the 1969 Convention should in most contexts be taken to refer equally to these provisions as incorporated into domestic laws.

³ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

⁴ Lee Anne de la Hunt authored the questionnaire.

⁵ Though it should be noted that Refworld has an impressive collection of African state legislation, including national refugee acts. See: <http://www.unhcr.org/refworld/type/LEGISLATION.html>.

generalized violence. Completed questionnaires and/or documents responsive to requests made in the questionnaire were received from 24 UNHCR country offices.⁶ Summary information on responsibility for, and the legal basis of, RSD was provided on these 24 plus 19 further countries⁷ in a table produced by UNHCR's Regional Bureau for Africa. Additional information on certain States in southern Africa⁸ was drawn from a UNHCR report.⁹ In addition to completed questionnaires, other primary research sources used—which were generally but not always provided by UNHCR country offices in response to the questionnaire—included decisions on refugee status, national refugee legislation (primary and secondary), forms used by decision-makers in adjudicating refugee status, minutes of refugee status eligibility committee meetings and sample RSD interview reports. Secondary sources included academic articles, books, book chapters, reports and UNHCR's on-line country profiles.¹⁰ Of Africa's 54 States, some information—whether responsive to a questionnaire or otherwise and whether primary or secondary—was available in respect of 50. The type of information available for each State is reflected in a table at Annex I. Because the same range of information was not available for all 50 countries, the study cannot generalize. Generalizations are made only to the extent permitted by the information available; the States on whose practice key conclusions are based are clearly identified.

In many cases, the primary information available was very limited and/or did not include much detail on how individuals fleeing conflict and/or violence are protected. An effort was made to supplement the information gathered pursuant to the questionnaire with additional primary research, particularly in respect of RSD decisions. However, as noted above, most States in Africa do not report their RSD decisions. Two notable exceptions are Benin and South Africa.¹¹ Moreover, even where decisions are available, they tend to contain limited legal reasoning that might reveal how Article I(2) of the 1969 Convention is understood and applied.¹² Owing presumably to this limited range of primary research material, the range of secondary sources on the interpretation of Article I(2) of the 1969 Convention is also very narrow. Few academic

⁶ In west Africa, Benin, Burkina Faso, Chad, Gabon, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal and Togo; in southern Africa, Angola, Mozambique, Zambia and Zimbabwe; and in east and the horn of Africa, Burundi, Djibouti, the Democratic Republic of Congo (DRC; note that there is currently no RSD in DRC), Ethiopia, Kenya, South Sudan and Tanzania.

⁷ Botswana, Cameroon, Cape Verde, Central African Republic, Côte d'Ivoire, Eritrea, Gambia, Madagascar, Malawi, Mauritius, Namibia, the Republic of Congo, Rwanda, Sierra Leone, Somalia, South Africa, Sudan, Swaziland and Uganda.

⁸ Angola, Botswana, Malawi, Mozambique, Namibia, South Africa, Zambia and Zimbabwe.

⁹ UNHCR, Regional Office for Southern Africa, *Refugee Status Determination in Southern Africa: Best Practices and Gaps Analysis* (UNHCR 2010).

¹⁰ See: <http://www.unhcr.org/pages/49c3646c206.html>.

¹¹ South Africa is the only African country with a page on <http://www.refugeecaselaw.org>, a site maintained by the University of Michigan law school, where judicial decisions are available. Judicial decisions have also been compiled by the University of Cape Town's Refugee Rights Project and made available at: http://www.refugeerights.uct.ac.za/legal/case_law_reader. First instance administrative decisions have at times been made available to researchers. Benin's decisions are available at: <http://www.cnarbenin.bj>.

¹² See section IV.2.

papers have been published on the 1969 Convention's regional refugee definition specifically.¹³ Similarly rare are recent general analyses of African domestic legal frameworks for refugee protection,¹⁴ despite initiatives to promote scholarship on this topic.¹⁵

As a result of the limited nature of the primary information available, the lack of reported RSD decisions, the absence or inadequacy of the legal reasoning in decisions that are published and the dearth of secondary source material, this study's conclusions on how people fleeing conflict and/or violence are protected under the 1969 Convention are necessarily limited. Further empirical research into asylum procedures and refugee decision-making in Africa should be pursued. This paper's conclusions reflect what themes emerged from the research material that was available, with a number of country-specific examples. These conclusions are placed in context with the following background on the 1969 Convention and the general refugee situation in Africa.

III THE 1969 CONVENTION

Regional-level work on the issue of refugee protection in Africa began very soon after the Organization of African Unity's (OAU) 1963 formation, as evidenced by a 1964 resolution of the body's Council of Ministers. The resolution established an ad hoc commission consisting of OAU ambassadors from Burundi, Cameroon, Congo-Léopoldville (today the Democratic Republic of the Congo (DRC)), Ghana, Nigeria, Rwanda, Senegal, Sudan, Tanganyika (today Tanzania) and Uganda to examine '(a) the refugee problem in Africa and make recommendations to the Council

¹³ Tal Schreier, 'An Evaluation of South Africa's Application of the OAU Refugee Definition' (2008) 25 *Refugee* 53, 53. Exceptions are: Alice Edwards, 'Refugee Status Determination in Africa' (2006) 14 *Afr J Intl Comp L* 204; Micah Bond Rankin, 'Extending the Limits or Narrowing the Scope? Deconstructing the OAU Refugee Definition Thirty Years On' (2005) 21 *S Afr J Hum Rts* 406. It should be noted that these two works are based on principled legal reasoning, rather than on any extensive review of jurisprudence.

¹⁴ Exceptions are: Roni Amit, 'No Refuge: Flawed Status Determination and the Failures of South Africa's Refugee System to Provide Protection' (2011) 23 *IJRL* 458; Roni Amit, 'All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination' (2012) African Centre for Migration & Society Research Report, available at: <http://www.migration.org.za/publication/all-roads-lead-rejection-persistent-bias-and-incapacity-south-african-refugee-status-det>; Khoti Kamanga, 'The (Tanzania) Refugees Act of 1998: Some Legal and Policy Implications' (2005) 18 *JRS* 100; Tapiwa Shana Nkhoma, 'The Institution of Asylum in Malawi and International Refugee Law: A Review of the 1989 Refugee Act' (2010) 4 *Malawi LJ* 97; Marina Sharpe and Salima Namusobya, 'Refugee Status Determination and the Rights of Recognised Refugees Under Uganda's Refugee Act, 2006' (2012) 24 *IJRL* 561.

¹⁵ In November 2010, the University of Oxford's Refugee Studies Centre convened in Kampala a two-day workshop on RSD and refugee rights in east and southern Africa. The workshop papers and its report are available at: <http://www.rsc.ox.ac.uk/events/refugee-status-determination-and-rights>. The Refugee Programme of Fahamu (www.refugeelegalaidinformation.org) has also sought to foster scholarship on domestic refugee protection frameworks in the global south.

of Ministers on how it can be solved; [and] (b) ways and means of maintaining refugees in their country of asylum'.¹⁶

The drafting process this resolution ultimately gave rise to is the subject of varied and conflicting accounts, in part because there are no official travaux préparatoires for the 1969 Convention. These accounts can, for ease of exposition, essentially be divided into two categories. On the one hand are commentators who address the Convention's drafting history only briefly, without reference to primary sources such as OAU resolutions and archival material. They tend to note that the OAU's interest in a regional refugee instrument was the result of the persecution-based universal refugee definition's failure to reflect African realities,¹⁷ such as displacement resulting from colonialism and racist regimes. On the other hand are a handful of writers who have addressed the 1969 Convention's drafting history in some depth.¹⁸ Such accounts have consistently attributed the motivations behind the 1969 Convention to two factors: '[t]he first of these was the problem of subversive activities and the other the date line contained in Article 1A(2) of the 1951 Convention. The latter meant that whatever was the legal scope of application of the 1951 Convention, it did not apply to the new refugee situations which had arisen in Africa'.¹⁹

The historical record is consistent with this latter account.²⁰ In particular, that four of the five drafts of the 1969 Convention include only the 1951 Convention refugee definition (without the dateline) confirms that dissatisfaction beyond the dateline question was simply not a factor initially motivating the adoption of a regional instrument. Until the time the 1967 Protocol relating to the Status of Refugees²¹ (1967 Protocol) was adopted, work on the 1969 Convention was directed at making the 1951 Convention applicable in Africa; only later would addressing refugee issues particular to Africa—concern that refugees should not be a source of friction

¹⁶ Organization of African Unity (Council of Ministers), 'Resolution on the Problem of Refugees in Africa' (OAU Lagos 24-29 February 1964) CM/Res 19 (II).

¹⁷ George Okoth-Obbo, 'Thirty Years On: A Legal Review of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa' (2001) 20 RSQ 79, 109; see, for example: Ousmane Goundiam, 'African Refugee Convention' [1970] Migr News 3, 8; Jennifer L Turner, 'Liberian Refugees: a Test of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa' (1994) 8 Geo Immigr LJ 281, 286; Jennifer Hyndman and Bo Victor Nylund, 'UNHCR and the Status of Prima Facie Refugees in Kenya' (1998) 10 IJRL 21, 34–35.

¹⁸ See: Louise Holborn, *Refugees: A Problem of our Time – The Work of the United Nations High Commissioner for Refugees, 1951-1972, Vol I & II* (New Jersey: Scarecrow Press, 1974); Ivor Jackson, *The Refugee Concept in Group Situations* (Leiden: Martinus Nijhoff, 1999); Okoth-Obbo, note 17 above, 109–112.

¹⁹ Okoth-Obbo, note 17 above, 109–110. Article 1A(2) of the 1951 Convention limited the instrument's applicability to flight from events occurring before 1 January 1951. Under Article 1B, States have the option of further limiting its applicability to events occurring in Europe. Among African States, only Madagascar and the Republic of Congo recognise this geographical limitation.

²⁰ For detailed exposition of this record, see: Marina Sharpe, 'Organization of African Unity and African Union Engagement with Refugee Protection: 1963 to the Present' forthcoming in *Afr J Intl Comp L*.

²¹ Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

between States and that individuals fleeing particularly African situations such as colonialism and white racist regimes should receive refugee protection—become an explicit objective.

The legal instrument these concerns ultimately gave rise to has—alongside the 1951 Convention²²—governed the protection of refugees in Africa since its entry into force in 1974. In defining a refugee, the 1969 Convention's Article I provides two sub-provisions. The first adopts the refugee definition found in Article 1A(2) of the 1951 Convention, minus the 1 January 1951 date limit that most States later agreed, by way of the 1967 Protocol,²³ not to apply. This definition applies to those outside their country of origin (or habitual residence in the case of stateless refugees) who cannot return there because of 'a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion'.²⁴ The second sub-provision provides, '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'.²⁵

In moving away from the 1951 Convention's emphasis on individualized persecution linked to Convention grounds in favour of a focus on disruptive conditions in the country of origin or nationality, the Article I(2) refugee definition stresses protection from what might be more broadly applicable conditions. According to Hathaway, it 'acknowledges that fundamental forms of abuse may occur not only as a result of the calculated acts of the government... but also as a result of that government's loss of authority'.²⁶ This outward orientation has led to the conclusion among most scholars of the 1969 Convention that the Article I(2) refugee definition is 'based solely on objective criteria'²⁷ and therefore mandates an objective test of refugee status.²⁸ This consensus is overstated, for two reasons. First, focus on the objectivity of the Article I(2) refugee definition overestimates the subjectivity of the 1951 Convention definition²⁹ and underestimates the extent to which the universal definition can equally apply to victims of war

²² See part III of Marina Sharpe, 'The 1969 African Refugee Convention: Innovations, Misconceptions, and Omissions' (2012) 58 McGill LJ 95.

²³ 1967 Protocol, note 21 above, art 1(2).

²⁴ 1951 Convention, note 3 above, art 1A(2).

²⁵ 1969 Convention, note 1 above, art I(2).

²⁶ James Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) 17.

²⁷ Emmanuel Opoku Awuku, 'Refugee Movements in Africa and the OAU Convention on Refugees' (1995) 39 J Afr L 79, 81.

²⁸ See, for example, Eduardo Arboleda, 'Refugee Definition in Africa and Latin America: The Lessons of Pragmatism' (1991) 3 IJRL 185, 195; Okoth-Obbo, note 17 above, 112; Paul Weis, 'The Convention of the Organization of African Unity Governing the Specific Aspects of Refugee Problems in Africa' (1970) 3 Revue des droits de l'homme 449, 455; WJEM van Hövell tot Westerflier, 'Africa and Refugees: the OAU Refugee Convention in Theory and Practice' (1989) 7 NQHR 172, 175.

²⁹ Rankin, note 13 above, 411.

and civil strife.³⁰ Second, views of the Article I(2) refugee definition as entirely objective overlook elements of the definition that mandate an assessment of the nexus between the individual and the disruptive situation in the country of origin or nationality: that the individual must have been ‘compelled’ to leave his or her ‘place of habitual residence’³¹ and that such flight must have been ‘owing to’ external aggression, occupation, foreign domination or events seriously disturbing public order. These aspects of Article I(2) and their impact on RSD under the 1969 Convention are addressed in detail in section IV.2.2 below.

To date the 1969 Convention has been ratified by 45 of Africa’s 54 States. Eritrea, Sao Tomé & Príncipe and South Sudan have neither signed nor ratified the 1969 Convention. Morocco is also not party to the Convention, having withdrawn from the OAU in 1985 after the Saharawi Arab Democratic Republic was admitted as a member State. Djibouti, Madagascar, Mauritius, Namibia and Somalia have signed but not ratified the 1969 Convention. The Comoros, Eritrea, Libya, Mauritius and South Sudan have neither signed nor ratified the 1951 Convention nor its 1967 Protocol. Madagascar is a party to the 1951 Convention but not its 1967 Protocol, and it and the Republic of Congo continue to recognize the 1951 Convention’s geographical limitation.³² Despite the fact that most African countries have ratified the international and regional refugee instruments, the situation for the almost three million³³ refugees in Africa is difficult, with their rights regularly violated.³⁴ Many refugees in Africa will have fled as a result of conflict and other situations of violence at home. Indeed, as of the end of 2010, the vast majority of refugees in Africa were recognized under the 1969, not the 1951, Convention.³⁵ How its Article I(2) is applied to protect individuals from return to conflict and violence is considered below.

³⁰ Jackson, note 18 above, 178; Okoth-Obbo, note 17 above, 117; see Vanessa Holzer, ‘The 1951 Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence’ (2012) UNHCR Legal and Protection Policy Research Series, 12; Walter Kälin, ‘Refugees and Civil Wars: Only a Matter of Interpretation?’ (1991) 3 IJRL 435.

³¹ Edwards, note 13 above, 228; Okoth-Obbo, note 17 above, 116; Rankin, note 13 above, 412.

³² See note 19 above.

³³ According to the US Committee for Refugees and Immigrants 2009 World Refugee Survey, at 31 December 2008 there were 2,959,900 refugees in Africa.

³⁴ See, among other works: Edwin Abuya, ‘From Here to Where? Refugees Living in Protracted Situations in Africa’ in Alice Edwards and Carla Ferstman, *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge: Cambridge University Press, 2010); Jeff Crisp, ‘No Solutions in Sight: The Problem of Protracted Refugee Situations in Africa’ in I Ohta and Y Gebre, *Displacement Risks in Africa: Refugees, Resettlers and Their Host Population* (Kyoto: Kyoto University Press, 2005); Robin Ramcharan, ‘The African Refugee Crisis: Contemporary Challenges to the Protection of Refugees and Displaced Persons in Africa’ (2000) 8 Afr YB Intl L 119; Bonaventure Rutinwa, ‘The End of Asylum? The Changing Nature of Refugee Policies in Africa’ (2002) 21 RSQ 12; Guglielmo Verdine and Barbara Harrell-Bond, *Rights in Exile: Janus Faced Humanitarianism* (Oxford: Berghahn Books, 2005).

³⁵ UNHCR statistics, on file with the author.

IV STATE INDIVIDUAL REFUGEE STATUS DETERMINATION

Some information on RSD was available for the 43 States from which questionnaire or tabular responses were received from UNHCR, plus for two further States, namely Algeria and Egypt.³⁶ Of these 45 States, 35 have State-run RSD systems, while ten feature RSD conducted by UNHCR under its mandate. This discussion of individual RSD as conducted by States begins with a brief consideration of procedural aspects.

1 PROCEDURAL ASPECTS

The national legislation of African States with domestic refugee law generally incorporates both the 1951 Convention Article 1A(2)/1969 Convention Article I(1) refugee definition, as well as the 1969 Convention Article I(2) definition, whether by reproducing these refugee definitions in full or, less often, by referring to the relevant provisions of the international and regional refugee instruments (examples of the latter include Benin, Gabon, Ghana and Senegal). Exceptions are Botswana, Djibouti, Morocco and Zambia. Botswana has not incorporated the 1969 Convention within its 1968 Refugees (Recognition and Control) Act, however the country's Refugee Advisory Committee has recognized individual applicants from neighbouring countries on the basis of 1969 Convention principles.³⁷ Djibouti's 1977 refugee law does not incorporate the 1969 Convention, which it only signed in 2005 and which it has yet to ratify. In practice, however, Djibouti applies Article I(2) to individuals fleeing south and central Somalia, whom it recognizes on a *prima facie* basis.³⁸ Morocco's 1957 refugee law pre-dates the 1969 Convention and so does not reflect its Article I(2).³⁹ In Zambia, refugee status is declaratory,⁴⁰ thus while the 1969 Convention has not been incorporated, the government has the discretion to recognize refugees from conflict and/or violence.⁴¹

When African States adjudicate refugee claims individually, which is the normal practice in the absence of a situation of mass influx,⁴² the decision on refugee status is generally made by an administrative eligibility committee on which a variety of government departments are represented. UNHCR usually has advisory observer status on this committee, as in Benin, Chad, Ethiopia, Gabon, Mozambique, Niger, Tanzania and Zambia,⁴³ for example. In rare cases,

³⁶ The author has first-hand experience in Egypt, and information on Algeria was found on that country's UNHCR country profile.

³⁷ UNHCR Regional Office for Southern Africa, note 9 above, 21.

³⁸ Djibouti questionnaire, on file with the author.

³⁹ For more information on the situation in Morocco, see Channe Lindstrom, 'Report on the Situation of Refugees in Morocco: Findings of an Exploratory Study' (2002) available at: http://www.aucegypt.edu/GAPP/cmrs/reports/Documents/ChanneOct_000.pdf.

⁴⁰ Zambia Refugees (Control) Act 1970, Cap 120, s 3.

⁴¹ Zambia questionnaire, on file with the author.

⁴² Review of all questionnaires, which are all on file with the author.

⁴³ *Ibid.*

UNHCR has a decision-making role. Eligibility committees approach RSD in three principal ways. The first approach is for the committee itself to interview the refugee, as in the case of Chad.⁴⁴ Under the second approach, another State official conducts the status determination interview and the eligibility committee makes a decision on the basis of notes or a transcript taken during such interview. This is the situation in Uganda, where the police interview the applicant,⁴⁵ and in Tanzania, where an ‘authorised officer’ conducts the interview.⁴⁶ In the third and final approach, an eligibility official from the government’s refugee or immigration department conducts the interview and provides the eligibility committee with a transcript and a reasoned recommendation, on which the committee bases its decision. This is the approach in Angola, Mozambique and Zambia.⁴⁷ Some States combine elements from two or more of these approaches. Whatever the approach, detailed written reasons for the decision seem generally not to be provided.⁴⁸

Appeals are generally, though not always, available. In some cases, the same eligibility committee that decided the first instance case—though sometimes featuring new members—hears and decides on the appeal. This is the approach in Uganda, for example.⁴⁹ In other countries, a separate administrative appeals body exists. This is the case in, for example, Malawi and Tanzania.⁵⁰ Rarely is judicial review available, whether at the appeal level or as a third tier of review. It is legally possible in, for example, South Africa and Zambia.⁵¹ It has never actually occurred in Zambia,⁵² while in South Africa it has occurred to a limited extent, though this has been on procedural rather than substantive grounds.⁵³

2 SUBSTANTIVE ASPECTS

The research did not reveal any jurisprudence interpreting the 1969 Convention’s Article I(2). One might expect this to have emerged from South Africa, which has a relatively well-developed legal system. However, this has not been the case. Of the four available reviews of South African refugee jurisprudence,⁵⁴ none revealed an authoritative interpretation of section 3(b) of South Africa’s Refugees Act, which reflects Article I(2) of the 1969 Convention. Indeed, Amit notes that

⁴⁴ Chad questionnaire, on file with the author.

⁴⁵ Sharpe and Namusoby, note 14 above.

⁴⁶ Charles Nyonka, ‘Refugee Status Determination and Refugee Rights in Tanzania’ (2010) Paper contributed to University of Oxford Refugee Studies Centre Workshop on RSD and Rights in East and Southern Africa, 9, available at: <http://www.rsc.ox.ac.uk/events/refugee-status-determination-and-rights>.

⁴⁷ Review of all questionnaires, which are all on file with the author.

⁴⁸ *Ibid.*

⁴⁹ Sharpe and Namusoby, note 14 above.

⁵⁰ Review of all questionnaires, which are all on file with the author.

⁵¹ *Ibid.*

⁵² Chongo Chitupila, ‘The Administration of Refugees in Zambia’ (2010) Paper contributed to University of Oxford Refugee Studies Centre Workshop on RSD and Rights in East and Southern Africa, 9, available at: <http://www.rsc.ox.ac.uk/events/refugee-status-determination-and-rights>.

⁵³ Input from UNHCR’s Regional Office for Southern Africa.

⁵⁴ Amit (2011), note 14 above; Amit (2012), note 14 above; Schreier, note 13 above; Wood, see note 56 below.

section 3(b) 'has been largely absent from South Africa's status determination process'.⁵⁵ Moreover, all four studies noted the poor quality of South African refugee decision-making, three with specific reference to section 3(b). In Wood's as yet unpublished survey of 307 South African decisions on refugee status from 2009, 185 characterized the applicant's claim as involving conflict or violence. Fifty-five of these made reference to section 3(b) of South Africa's Refugees Act, however in all but three decisions, the reference to section 3(b) was cursory, consisting only of a statement such as 'the applicant does not have a refugee claim under section 3(b)'. The reasoning in the three decisions where such could be said to exist was, according to Wood, very short.⁵⁶ Amit remarks that none of the 324 decisions she reviewed demonstrated a correct application of section 3(b), 'effectively negating its role in the law'.⁵⁷ Schreier attributes poor quality RSD decisions to limited resources, which lead to a lack of training and low quality country of origin information.⁵⁸

2.1 The Relationship between the 1951 and 1969 Conventions

While no authoritative interpretation of Article I(2) has emerged from the case law, there do seem to be three distinct approaches regarding the instrument under which refugee status is adjudicated. The first is to begin by applying Article 1A(2) of the 1951 Convention and to move on to Article I(2) of the 1969 Convention only if the individual does not qualify under the 1951 Convention. This is the approach in Benin⁵⁹ and Burkina Faso. In the latter country, decisions are rendered on a form that instructs the decision-maker to proceed according to this sequence.⁶⁰ This approach is supported by paragraph 9 of the preamble to the 1969 Convention, which recognizes the 1951 Convention as 'the basic and universal instrument relating to the status of refugees', as well as by the ordering of the two refugee definitions in Article I of the 1969 Convention.

An alternative approach is employed in Angola, Chad, Mozambique, Tanzania, Zambia and Zimbabwe,⁶¹ as well as in South Africa⁶² and Uganda,⁶³ where the instrument applied is a function of the nature of the claimant's flight. Where such dictates the application of Article I(2), individual circumstances of persecution are not considered. In Chad and Zambia,⁶⁴ as well as in

⁵⁵ Amit, note 14 above, 45.

⁵⁶ The author is grateful to University of New South Wales doctoral candidate Tamara Wood for sharing these as yet unpublished findings on the South African jurisprudence in relation to section 3(b) of the Refugees Act/Article I(2) of the 1969 Convention.

⁵⁷ Amit, note 14 above, 474.

⁵⁸ Schreier, note 13 above, 56.

⁵⁹ Benin questionnaire, on file with the author.

⁶⁰ 2009 Burkina Faso decision, on file with the author.

⁶¹ Angola, Chad, Mozambique, Tanzania, Zambia and Zimbabwe questionnaires, on file with the author.

⁶² Schreier, note 13 above, 54.

⁶³ Remarks of Douglas Asiimwe (Senior Protection Officer, Office of the Prime Minister, Republic of Uganda) at UNHCR Expert Roundtable, Cape Town, 14 September 2012.

⁶⁴ Chad and Zambia questionnaires, on file with the author.

South Africa,⁶⁵ if it is clear that the claimant ran from conflict, then the assessment proceeds on the basis of Article I(2). Van Beek explains the South African approach, which ‘depends on whether it is “obvious” that an applicant is a refugee, based on the danger and instability within a part of the applicant’s country of origin’.⁶⁶ In Angola and Mozambique, there is an observed tendency to conduct most RSD under the 1969 Convention’s Article I(2),⁶⁷ even when the 1951 Convention Article 1A(2)/1969 Convention Article I(1) refugee definition would equally apply, both legally and factually. In Zimbabwe, RSD always occurs under Article I(2), even though the 1983 Refugees Act incorporates both the 1951 and 1969 Convention definitions.⁶⁸ This tendency in Angola and Mozambique to employ—and in the case of Zimbabwe, to automatically resort to—Article I(2) likely relates to the nature of flight to the three countries, which according to UNHCR is better reflected by Article I(2) than by the 1951 Convention definition.⁶⁹

It is not always, however, a case of either a sequential or fact-based ‘nature of flight’ approach. The application of the 1951 and/or 1969 Conventions is sometimes pragmatic. According to Okoth-Obbo, the Article I(2) refugee definition is easier to apply in situations of large-scale influx than is Article 1A(2) of the 1951 Convention,⁷⁰ in particular because of its compatibility with RSD conducted on a prima facie basis. Moreover, many States consider applying Article I(2) to be generally more expedient and less resource intensive than applying Article 1A(2) of the 1951 Convention.⁷¹ Zambia, for example, has a policy of conducting RSD on a prima facie basis under the 1969 Convention in the borderlands, where most refugees arrive. Those whose claims are more aligned with the 1951 Convention are referred to the capital, Lusaka, for individual determination under Article 1A(2).⁷² Those who arrive in Lusaka without having transited through the borderlands also have their claims processed under the 1951 Convention.⁷³

In still other cases the approach seems unsystematic. In Nigeria, the refugee legislation of which includes both the 1951 and 1969 Convention refugee definitions, a case based on flight from unspecified insecurity was rejected under Article 1A(2) without any subsequent consideration of Article I(2).⁷⁴ The same was true of a decision from Guinea, regarding a woman who fled the conflict in Liberia in 1992.⁷⁵ Even worse than an unsystematic approach, a number of decisions

⁶⁵ Schreier, note 13 above, 54.

⁶⁶ Ingrid van Beek, ‘Prima Facie Asylum Determination in South Africa: A Description of Policy and Practice’ in Jeff Handmaker, Lee Anne de la Hunt and Jonathan Klaaren (eds) *Perspectives on Refugee Protection in South Africa* (Pretoria: Lawyers for Human Rights, 2001) 18, cited by Schreier, note 13 above, 54.

⁶⁷ Angola questionnaire and Mozambique questionnaire, on file with the author.

⁶⁸ Zimbabwe questionnaire, on file with the author.

⁶⁹ UNHCR Regional Office for Southern Africa, note 9 above, 21. The nature of flight to countries beyond Angola, Mozambique and Zimbabwe may also be best reflected by Article I(2) of the 1969 Convention, however the available information was limited to these three.

⁷⁰ Okoth-Obbo, note 17 above, 120.

⁷¹ Input from UNHCR’s RSD Unit.

⁷² Chitupila, note 52 above, 8.

⁷³ Zambia questionnaire, on file with the author.

⁷⁴ Nigerian decision no. 5, in April 2010 report of the Nigerian Eligibility Committee, on file with the author.

⁷⁵ Undated Guinean decision 1, on file with the author.

evidenced a misunderstanding of the distinct nature of the two refugee definitions. In two Guinean cases, the reasoning combined the 1951 Convention's 'membership of a particular social group' ground with the 1969 Convention's ground of 'events seriously disturbing public order'.⁷⁶ This conflation was also evident in a decision from Liberia.⁷⁷

2.2 The Test for Refugee Status under Article I(2)⁷⁸

In addition to the order in which the 1969 Convention is invoked relative to its 1951 counterpart, another issue salient to the African instrument's application is the extent to which the personal circumstances of the applicant, as opposed to the objective circumstances prevailing in the country of origin, inform the test for refugee status under Article I(2). Article I(2) has traditionally been regarded as susceptible of an entirely objective application largely disconnected from personal circumstances. However, it is far from clear that refugee status under Article I(2) should be assessed entirely on an objective basis, for two primary reasons. First, the Article I(2) refugee definition is framed in terms of individual status. Edwards argues that 'this necessitates inquiring into the individual or subjective reasons for flight of each applicant'.⁷⁹ The second reason is textual, beginning with the use of the word 'compelled'. The 'compelled' aspect of the Article I(2) refugee definition seems to have much in common with the 'fear' aspect of the 1951 Convention definition, which necessitates the consideration of individual aspects of the case: particular events that may compel one person to flee his or her place of habitual residence may not result in such compulsion in another individual whose appreciation of the risk of the events differs. Indeed, Okoth-Obbo notes that Article I(2) 'is predicated mainly on the compulsion to leave the place of habitual residence in order to seek refuge. ...[This] reintroduces the problematic question of motive for flight which it is otherwise credited with having disabused from the refugee definition'.⁸⁰

The reference to compulsion in Article I(2) seems to mandate an assessment of whether the disruptive situation in question caused the individual refugee's flight, as opposed to a test ignorant of personal circumstances that looks solely for the existence in fact of a disruptive situation in the refugee's country of origin or nationality. Yet commentary on the 1969 Convention has rarely explicitly addressed whether a nexus between the disruptive situation and flight is required. Rather, there seems to be an implicit interpretive consensus presuming that an individual would not flee a disruptive situation but for a nexus between such situation and his or her compulsion to leave. Indeed, according to Hathaway, 'because the African standard emphasizes assessment of the gravity of the disruption of public order rather than motives for flight, individuals are largely able to decide for themselves when harm is sufficiently

⁷⁶ Undated Guinean decisions 2 and 3, on file with the author.

⁷⁷ 1 February 2010 Liberian decision, on file with the author.

⁷⁸ This section draws largely on Sharpe, note 22 above; i.e. much of this section condenses part of an article in the *McGill Law Journal*.

⁷⁹ Edwards, note 13 above, 228.

⁸⁰ Okoth-Obbo, note 17 above, 116 (emphasis added); see also Edwards, note 13 above, 228.

proximate to warrant flight'.⁸¹ Implicit in this view is the assumption that in the determination of refugee status, flight itself is sufficient evidence of compulsion. While in most cases this assumption will be borne out, it obfuscates the importance of, first, the words 'owing to' and, second, the fact that the individual must be compelled to leave his or her 'place of habitual residence'. Indeed, the inclusion of 'owing to' and 'place of habitual residence' further suggest that, in principle, the nexus between the disruptive events and flight ought to be more than merely presumptive.

The ordinary meaning of 'owing to' is analogous to 'as a result of', 'because of' or 'due to'. Accordingly, under the Article I(2) definition, a refugee is someone who, as a result of, because of or due to a disruptive situation, flees his or her place of habitual residence. Put this way, it becomes clear that flight must be the direct consequence of a risk of harm to the individual stemming from the disruptive situation; the words 'owing to' are an additional textual element of the Article I(2) refugee definition that mandates a subjective test of refugee status, because they suggest the requirement of a nexus between the disruptive situation and flight. Furthermore, the Article I(2) refugee definition specifically provides that a refugee must have fled his or her 'place of habitual residence', as opposed to his or her 'country of origin or nationality'. According to Rankin, this clause is used to focus 'attention on those who face danger because of the state of their communities', resulting in 'an implied relationship or geographic nexus between an OAU event and a person's place of habitual residence'.⁸² That the Article I(2) definition requires physical proximity between the putative refugee and the disruptive situation further suggests that the regional refugee definition demands that a nexus between the risk of harm and reasons for flight be established. Indeed this was the approach taken in a South African refugee appeal board decision analyzed by Schreier.⁸³

The requirement that flight be from the place of habitual residence also explains why the fact that the harm may be in 'either part or the whole of' the country of origin or nationality does not expand the refugee definition as much as might initially appear. The specific mention that the harm may be in 'part or the whole of' the country of origin or nationality makes it at least initially plausible that an individual may be recognized as a refugee if his or her flight is prompted by a situation anywhere in his or her homeland. However, in context, it becomes clear that there is 'a necessary link between the asylum seeker and the OAU event... the nexus is created by the fact that an asylum seeker is compelled to leave his or her place of habitual residence'.⁸⁴ Moreover, 'either part or the whole of his country of origin or nationality' likely applies only to 'events seriously disturbing public order'. This is so for interpretive reasons—the lack of a comma between 'events seriously disturbing public order' and 'in either part or the

⁸¹ Hathaway, note 26 above, 18.

⁸² Rankin, note 13 above, 432 (emphasis added).

⁸³ Schreier, note 13 above, 60.

⁸⁴ Rankin, note 13 above, 434; see also Jacob van Garderen and Julie Ebenstein, 'Regional Developments: Africa' in Andreas Zimmermann (ed) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (Oxford: OUP, 2011) 191.

whole of' and the result of applying the doctrine *eiusdem generis*⁸⁵—and because the necessity of specifying 'either part or the whole of' attaches only to 'events seriously disturbing public order'. Occupation and foreign domination, even if only prevailing in one part of a State, will almost by definition affect the country as a whole. Edwards puts it as follows: 'the international requirement associated with the... three terms suggests that they are experienced throughout the whole of the territory *de jure*, even if the actions are limited to specific parts of the territory *de facto*'.⁸⁶ The inclusion of 'either part or the whole of his country of origin or nationality' thus implies that a refugee cannot justifiably flee events that are not directly connected to him or her.

In summary, the terms 'compelled', 'owing to' and the requirement that an individual have fled his or her 'place of habitual residence', coupled with the limited applicability of 'either part or the whole of his country of origin or nationality', suggest that in cases where the effects of the disruptive situation in question are not felt country-wide, a nexus between such situation and flight must be established, as opposed to merely presumed. In addition to establishing nationality, it would therefore be necessary to examine the particular facts of the case. Determining refugee status under Article I(2) of the 1969 Convention is not a purely objective test involving a mere assessment of whether a disruptive situation is affecting the country of origin or nationality; it also requires—at least in cases where the disruptive situation is not experienced country-wide—an assessment of the risk of harm the disruptive situation actually posed to the individual concerned and his/her compulsion to flee.

However, in situations in which the disruptive situation does affect the whole of the country from which the individual has fled, the existence of such a nexus may, as a purely procedural matter, be presumed; any other approach would belabour the obvious and, particularly in large-scale influxes, risks overwhelming already strained RSD processes. This approach finds support in the 1969 Convention's preamble. Preambular paragraph 1 notes 'with concern the constantly increasing numbers of refugees in Africa and desirous of finding ways and means of alleviating their misery and suffering as well as providing them with a better life and future'. Paragraph 2 recognizes 'the need for an essentially humanitarian approach towards solving the problems of refugees'. Moreover, the presumption of a nexus between a disruptive situation and flight is clearly the basis on which RSD conducted on a *prima facie* basis—a common practice in Africa—rests, and this has been the approach in individual claims in South Africa at least.⁸⁷ There,

⁸⁵ This doctrine specifies that 'general words following special words are limited to the genus indicated by the special words' (Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed, Manchester: Manchester University Press, 1984) 153.

⁸⁶ Edwards, note 13 above, 227.

⁸⁷ Anais Tuepker, 'On the Threshold of Africa: OAU and UN Definitions in South African Asylum Practice' (2002) 15 JRS 409, 418; Schreier, note 13 above, 55.

decision makers have relied on ‘implicit “white lists” of refugee producing countries’ and focused on ‘merely confirming the nationality of an asylum seeker’.⁸⁸

Observers have, however, raised concerns about the ‘white list’ approach,⁸⁹ in particular because ‘white lists’ may be unduly circumscribed. Indeed, Schreier notes that the South African practice ‘may include generalized and hence incorrect assumptions about what constitutes an OAU or section 3(b) event and a lack of appropriate consideration of the other elements of the definition’.⁹⁰ A related problem is that applicants who are not from listed countries may find it comparatively difficult to have their refugee status recognized. Tuepker explains, ‘[w]hat is troubling is the frequent link to a converse practice of rejecting applicants on the basis of nationality’.⁹¹ It seems that ‘white lists’—and the use of presumptions more generally—constitute an efficient mode of determining refugee status in certain contexts, as long as ‘white lists’ and presumptions are not construed restrictively and do not lead to skepticism about the claims of individuals not from listed countries or countries other than those in respect of which a presumption has been invoked.

2.3 The Importance and Meaning of ‘Events Seriously Disturbing Public Order’

The ground of ‘events seriously disturbing public order’ in Article I(2) of the 1969 Convention appears to be the primary element of the definition under which refugee status is determined today.⁹² It seems that the other grounds of refugee status under Article I(2)—external aggression, occupation and foreign domination—are now largely irrelevant.⁹³ This is not surprising, given that they were conceived when much of Africa was still under colonial rule. The predominant use of the ground of ‘events seriously disturbing public order’ may also reflect the changing character of war in Africa, with fewer international and more internal armed conflicts.

Conflict appears to be the most common situation constituting ‘events seriously disturbing public order’. This was particularly evident in decisions from Benin, Chad and South Africa. These decisions did not distinguish between conflicts among clans or rebels and conflict between the government on the one hand and clans or rebels on the other. Examples of conflicts deemed by the Beninese, Chadian and South African jurisprudence to constitute ‘events seriously disturbing public order’ are the 2010 post-election violence in Côte d’Ivoire, the conflict between the forces of General Laurent Nkunda and the DRC army in the Kivu region, the 2002 civil war

⁸⁸ Schreier, note 13 above, 55. See also Lee Anne de la Hunt, ‘Refugee Law in South Africa: Making the Road of the Refugee Longer’ in Legal Resources Foundation, *A Reference Guide to Refugee Law and Issues in Southern Africa* (Lusaka: Legal Resources Foundation, 2002) 34.

⁸⁹ Tuepker, note 87 above, 418; Schreier, note 13 above, 55; De la Hunt, note 88 above, 34.

⁹⁰ Schreier, note 13 above, 61.

⁹¹ Tuepker, note 87 above, 418.

⁹² Review of all primary materials, which are all on file with the author. In 2008, for example, both Beninese decisions under Article I(2) were based on ‘events seriously disturbing public order’.

⁹³ Bahame Tom Mukirya Nyanduga, ‘Refugee Protection Under the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa’ (2004) 47 *German YB Intl L* 85, 92.

in Côte d'Ivoire, the Angolan civil war, the Rwandan genocide and clan fighting in Kismayo and Mogadishu, Somalia.

Two South African cases seen by Schreier further qualify the meaning of 'events seriously disturbing public order'. The first notes that it implies the government's loss of control.⁹⁴ The second expands upon this notion, noting, '[w]here law and order has broken [down] and the government is unwilling or unable to protect its citizens, it can be said that there are events seriously disturbing public order. To determine when a disturbance had taken place involves 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. The test should be objective'.⁹⁵ Thus it is not the loss of governmental control that is salient, but rather that such loss of control threatens the civilian protection.

It should also be noted that none of the primary materials revealed a reliance on the definition of 'armed conflict' employed in international humanitarian law (IHL). Moreover, limiting the scope of how conflict is understood under the 'events seriously disturbing public order' ground of the 1969 Convention to the IHL definition of armed conflict risks limiting the range of situations to which the 1969 Convention can be applied, which would be inconsistent with the instrument's humanitarian object and purpose. Finally, while international armed conflict was not explicitly referenced in any of the primary materials reviewed, there is no principled reason why 'events seriously disturbing public order' should not include international armed conflict.

In summary then, 'events seriously disturbing public order' as understood in the primary materials in at least three jurisdictions implies conflict—not strictly in the IHL sense of the term, whether international or non-international and whether among non-state actors or between non-state actors and the government—leading to loss of governmental control and the inability or unwillingness of the government to regain such control.

There are, however, other situations that are considered 'events seriously disturbing public order'. Nigerian case law appears to consistently absorb generalized violence within Article 1(2) of the OAU Convention. All 1969 Convention Nigerian decisions available—of which there were four, three related to applicants from the DRC and one from Somalia—noted that '[t]he applicant is outside of her country of nationality or habitual residence and is unable to return there owing to serious and indiscriminate threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order'.⁹⁶ This language mirrors UNHCR's broader refugee definition, which it applies when conducting RSD under its mandate. In its mandate RSD operations, UNHCR has adopted a wider refugee definition, based on the definitions in the 1969 Convention and the 1984 Cartagena Declaration on Refugees. In practical

⁹⁴ Schreier, note 13 above, 60.

⁹⁵ Schreier, note 13 above, 61 (emphasis added).

⁹⁶ Nigerian decisions in April 2010 report of the Nigerian Eligibility Committee, on file with the author (emphasis added).

terms, this has extended UNHCR's mandate to a variety of situations of forced displacement resulting from conflict, indiscriminate violence or public disorder. In light of this evolution, UNHCR considers that serious (including indiscriminate) threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order warrant international protection under its mandate.⁹⁷ In applying the 1969 Convention, the Nigerian decisions make the existence of 'serious and indiscriminate threats to life, physical integrity or freedom' the threshold consideration for recognition under Article I(2), whether such threats stemmed from generalized violence or events seriously disturbing public order. It is unclear why Nigerian practice operationalizes Article I(2) via UNHCR's broadened refugee definition; this may be an incorrect conflation of what are two similar, though actually distinct, legal criteria for refugee status.

Such State approaches to Article I(2)'s 'events seriously disturbing public order' clause have led academics to attempt to come to a principled interpretation of it.⁹⁸ The understandings of the term that have emerged from their analysis should supplement interpretations of the term based on State practice. Edwards' inquiry into the meaning of 'events seriously disturbing public order' proceeds on the basis of three guiding questions. First, she asks whether the term encompasses events of a non-international character. She bases this question on the interpretive rule *noscitur a sociis*, which mandates that words be interpreted in the context of surrounding language. 'External aggression', 'occupation' and 'foreign domination' clearly have international connotations; it is on this basis that she surmises that 'events seriously disturbing public order' might also have been drafted with such in mind, with the result that they would not encompass purely internal situations. She concludes, however, that since States in their practice have demonstrated willingness—and, as evidenced above, indeed a tendency—to protect people in flight from internal disturbances, the term should not be taken to include only events of an international nature.⁹⁹

In response to her second question, what is meant by 'disruption of public order', Edwards surveys various international law contexts in which 'public order' has been employed, concluding that the term has administrative, social, political and moral meanings.¹⁰⁰ Rankin focuses on the use of 'public order' in the 1951 Convention, where the term was 'intended to be a reference to acts prejudicial to the "peace and tranquility of society at large" and was imbued with a broad sense of a threat to state authority'.¹⁰¹ He concludes that in the sense in which it was used in the 1951 Convention, 'public order was only thought to be at stake when there was a threat "to an uncertain number of persons carrying out their lawful occupations... or to society at

⁹⁷ UN High Commissioner for Refugees, *MM (Iran) v. Secretary of State for the Home Department - Written Submission on Behalf of the United Nations High Commissioner for Refugees*, 3 August 2010, C5/2009/2479, para 10, available at: <http://www.unhcr.org/refworld/docid/4c6aa7db2.html>.

⁹⁸ Edwards, note 13 above, 216–221; Rankin, note 13 above, 423–428.

⁹⁹ Edwards, note 13 above, 218.

¹⁰⁰ Edwards, note 13 above, 220.

¹⁰¹ Rankin, note 13 above, 425.

large, as in the case of riots and unrests”,¹⁰² though he cautions that ‘public order should not be conceived in the context of threats alone, but also in relation to the obligations owed by the state to its citizens’.¹⁰³

Edwards’ third question is ‘what would qualify as serious?’. In response, she finds that to meet the Article I(2) ‘serious’ threshold, the events in question must be ‘prolonged, on a massive scale, or harmful to life, freedom or security’.¹⁰⁴ Examples of events that would meet this requirement are ‘civil conflicts, coups d’états, militia or rebel group insurgencies and other similar actions’.¹⁰⁵ Rankin poses the same question, and frames his response in terms of three thresholds: non-international armed conflict as understood in IHL, internal disturbances and tensions that threaten an indeterminate number of people and the widespread violation of non-derogable human rights. According to Rankin, events meeting any one of these three thresholds would qualify under Article I(2) as ‘events seriously disturbing public order’.¹⁰⁶

Both Edwards and Rankin speculate as to whether ‘events seriously disturbing public order’ might have been intended to function as a residual clause that would capture all events that would not qualify as ‘external aggression’, ‘occupation’ or ‘foreign domination’. Rankin concludes that the term functions ‘as a basket clause capturing a generic set of refugee producing situations’.¹⁰⁷ Edwards is more cautious in her analysis. While conceding that a literal interpretation of ‘events seriously disturbing public order’ would tend to support conclusions such as that suggested by Rankin, she notes that this would conflict with UNHCR interpretive methodology regarding the 1951 Convention’s ‘particular social group’ ground.¹⁰⁸ The organization has cautioned against reading the ‘social group’ category as a catch-all that would render the other four grounds of refugee status superfluous. In a later discussion with Edwards, she reflected further that interpreting the 1969 Convention in line with UNHCR’s approach to the 1951 Convention is not required where the 1969 Convention terms have their own particular meaning or context. What remains important instead, she indicated, was that the terms be given their proper meaning within the context of the Convention as a whole.

Insofar as their inquiries can be summarized, Edwards’ and Rankin’s analyses suggest that ‘events seriously disturbing public order’ is not a catch-all but rather a term that provides refugee protection to individuals in flight from internal or international events that threaten life, freedom or security. This understanding, coupled with the State practice outlined above, yields an understanding of ‘events seriously disturbing public order’ in which the term refers to conflict - whether internal or international and whether among non-state actors or between non-state

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ Edwards, note 13 above, 220.

¹⁰⁵ Edwards, note 13 above, 221.

¹⁰⁶ Rankin, note 13 above, 426–427.

¹⁰⁷ Rankin, note 13 above, 423.

¹⁰⁸ Edwards, note 13 above, 217–218.

actors and the government - and other situations of violence that threaten civilian protection or, in other words, life, freedom or security.

2.4 Other Issues

Two further issues of note regarding State practice of individual RSD emerged from the research. The first was whether the Article I(2) refugee definition specifically precludes a so-called 'internal flight alternative'. Article I(2) mentions that the harm may be in 'part or the whole of' the country of origin or nationality, thereby precluding any onus on the individual to seek safety within his or her homeland. Indeed, in a 2006 Benin case, the possibility of internal flight was considered, and ultimately rejected.¹⁰⁹ Later, in 2008, Benin's eligibility board took a principled decision not to consider whether protection might have been found within the country of origin.¹¹⁰ Similarly, the template/checklist that assists decision-makers with RSD in Burkina Faso instructs them not to consider the possibility of internal flight. This approach reflects UNHCR's guidelines on internal flight or relocation alternative, which assert that based on a plain reading of Article I(2), such an analysis is not relevant under the 1969 Convention.¹¹¹

The second issue of note was that in 2009, a decision from Benin recognized a refugee sur place under Article I(2) of the 1969 Convention,¹¹² making no distinction as to whether the asylum-seeker was, at the time of the public disorder event, inside or outside his or her country of origin or nationality. Uganda has in certain cases adopted an analogous approach.¹¹³ Contrary opinion has, however, emerged from South Africa. According to the Chairperson of its Refugee Appeal Board, 'the OAU Convention ... cannot apply to a sur place case because of the wording of the definition ... you must be compelled to leave your habitual place of residence'.¹¹⁴ While in line with the language of Article I(2), this restrictive approach contradicts the 1969 Convention's preamble, which stresses the need for an essentially humanitarian approach to refugees, as well as its underlying rationale: the 1969 Convention was after all drafted in part with a view to protecting individuals fighting colonialism and racist regimes from outside their countries of origin. Moreover, it would create a protection gap in respect of individuals visiting the putative host country when conflict erupted but who could not otherwise be returned.

¹⁰⁹ 2006 Benin decision, on file with the author.

¹¹⁰ 2008 Benin decision, on file with the author.

¹¹¹ UNHCR, 'Guidelines on International Protection No 4: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees' (2003) HCR/GIP/03/04, at para 5. Rankin rejects any obligation of internal flight under the 1969 Convention on a more complex basis, arguing that throughout internal relocation there may still be a 'continuing compulsion' to flee: see Rankin, note 13 above, 433-434. South African State practice is apparently the opposite: see Schreier, note 13 above, 56.

¹¹² 2009 Benin decision, on file with the author.

¹¹³ Input from UNHCR.

¹¹⁴ Schreier, note 13 above, 56 (emphasis added).

V CONCLUSION

This study focused on how Article I(2) of the 1969 Convention is interpreted and applied in African State practice of individual RSD. The conclusions resulting from such assessment were limited by the dearth of primary information; the lack of reasoned jurisprudence was a particular problem. The findings were further limited by the difficulty of drawing general conclusions about the region from uneven information. Nevertheless, it is possible to identify the following trends, which shed light on African State practice relating to the protection of individuals fleeing armed conflict and other situations of violence.

1. Refugee status has generally been adjudicated pursuant to Article I(2) of the 1969 Convention either:
 - Sequentially, after status under Article 1A(2) of the 1951 Convention has been considered;
 - Because it is clear that Article I(2) is more aligned with the conditions or situation in the individual's country of origin or nationality at the time of flight (the 'nature of flight' approach); or
 - For pragmatic reasons such as efficiency, particularly during mass influx.
2. In some other situations, the basis on which refugee status was adjudicated either under Article 1A(2) of the 1951 Convention or Article I(2) of the 1969 Convention was unclear.
3. Article I(2) of the 1969 Convention is at times misapplied, for example it is sometimes conflated with Article 1A(2) of the 1951 Convention rather than applied as a separate definition.
4. In cases where the disruptive situation is limited to a specific part or parts of the country of origin, refugee status under Article I(2) requires that a nexus between the disruptive situation and flight be established. By contrast, in situations where the disruptive situation affects the whole of the country of origin or nationality, the existence of such a nexus may, purely as a matter procedure, be presumed. Drawing up 'white lists' of countries in respect of which such a presumption can be applied constitutes good practice, provided that this is not done restrictively and that negative effects on the claims of persons not from listed countries are mitigated.
5. The 'external aggression, occupation and foreign domination' grounds of refugee status under Article I(2) of the 1969 Convention seem rarely to be invoked. The most commonly applied ground for refugee status under Article I(2) seems generally to be 'events seriously disturbing public order'.
6. The ground of 'events seriously disturbing public order' is most commonly applied by decision-makers and interpreted by scholars to persons from situations of conflict—whether internal or international and whether among non-state actors or between non-state actors and the government—and other situations of violence that threaten civilian protection or life, freedom or security.

These conclusions must be read with the study's methodological limitations in mind. This study's most important conclusion is not, however, subject to any caveat. It is clear that Article I(2) of the 1969 Convention, its 'events seriously disturbing public order' ground in particular, has provided African States with the flexibility to offer protection to the many individuals and groups forced to flee conflict and other situations of violence on the continent. Even if the ability

to recognize refugees on a basis more aligned with the actual circumstances prevailing in Africa was not what initially motivated the drafting of the 1969 Convention, such has certainly proved important in practice. That Article I(2) is not applied consistently across the region is a problem of legal certainty and hence due process, rather than a fundamental problem of protection.

Annex
Source Material Available for Each State

	Questionnaire	Tabular Response	On-line UNHCR Country Profile	Other Primary or Secondary Source
1. Algeria			✓	
2. Angola	✓	✓		
3. Benin	✓	✓		
4. Botswana		✓		✓
5. Burkina Faso	✓	✓		
6. Burundi	✓	✓		
7. Cameroon		✓		
8. Cape Verde		✓		
9. CAR		✓		
10. Chad	✓	✓		
11. Comoros				
12. Congo		✓		
13. DRC	✓	✓		
14. Côte d'Ivoire		✓		
15. Djibouti	✓	✓		
16. Egypt				✓
17. Equatorial Guinea				
18. Eritrea		✓		
19. Ethiopia	✓	✓		
20. Gabon	✓			
21. Gambia		✓		
22. Ghana	✓	✓		
23. Guinea Bissau	✓	✓		
24. Guinea	✓	✓		
25. Kenya	✓	✓		✓
26. Lesotho				✓
27. Liberia	✓	✓		
28. Libya			✓	
29. Madagascar		✓		
30. Malawi		✓		✓
31. Mali	✓	✓		
32. Mauritania				✓
33. Mauritius		✓		
34. Morocco				✓
35. Mozambique	✓	✓		
36. Namibia		✓		
37. Niger	✓	✓		
38. Nigeria	✓	✓		
39. Rwanda		✓		
40. Sao Tomé & Príncipe				
41. Senegal	✓	✓		
42. Seychelles				
43. Sierra Leone		✓		
44. Somalia		✓		
45. South Africa		✓		✓
46. South Sudan	✓	✓		
47. Sudan		✓		✓
48. Swaziland		✓		
49. Tanzania	✓	✓		✓
50. Togo	✓	✓		
51. Tunisia			✓	
52. Uganda		✓		✓
53. Zambia	✓	✓		✓
54. Zimbabwe	✓	✓		