

The 1969 African Refugee Convention: Innovations, Misconceptions, and Omissions

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Résumé de l'article

Cet article donne un aperçu critique de la convention sur les réfugiés africains de 1969, débutant par un survol de ses innovations juridiques. Il aborde ensuite la plus incomprise d'entre elles—son unique définition de réfugié—en profondeur, en mettant l'accent sur la dissipation de l'idée fautive, mais très répandue, que cette définition est particulièrement large. Enfin, l'article examine le silence de la *Convention de 1969* sur les droits civils et politiques ainsi que socio-économiques des réfugiés, et la façon dont elle fonctionne comme le complément « régional » à la convention mondiale des réfugiés de 1951 à cet égard.

THE 1969 AFRICAN REFUGEE CONVENTION: INNOVATIONS, MISCONCEPTIONS, AND OMISSIONS

*Marina Sharpe**

This paper provides a critical overview of the 1969 African refugee convention, beginning with a survey of its legal innovations. It then addresses the most misunderstood of them—the unique refugee definition—in depth, with an emphasis on dispelling the common misconception that it is particularly expansive. Finally, it investigates the *1969 Convention's* silence regarding refugees' civil and political, and socio-economic rights, and how it works as the “regional complement” to the 1951 global refugee convention in that regard.

Cet article donne un aperçu critique de la convention sur les réfugiés africains de 1969, débutant par un survol de ses innovations juridiques. Il aborde ensuite la plus incomprise d'entre elles—son unique définition de réfugié—en profondeur, en mettant l'accent sur la dissipation de l'idée fausse, mais très répandue, que cette définition est particulièrement large. Enfin, l'article examine le silence de la *Convention de 1969* sur les droits civils et politiques ainsi que socio-économiques des réfugiés, et la façon dont elle fonctionne comme le complément « régional » à la convention mondiale des réfugiés de 1951 à cet égard.

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Introduction

As a refugee protection crisis engulfs Africa,¹ the Organization of African Unity's 1969 *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969 Convention)*² has remained largely beyond serious scrutiny. Understandably, in the wake of the convention's adoption, attention focused on its remarkable legal innovations.³ However, almost half a century later and amid declining standards of refugee protection in Africa, the discussion has scarcely moved on. When it receives any attention at all—which usually occurs around significant anniversaries⁴—the *1969 Convention* is either uncritically praised⁵ or else analysis remains focused on its novelties,⁶ in particular the unique refugee definition, at the expense of scrutiny of that definition or of the broader protec-

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- ¹ Among the works describing this crisis are Jeff Crisp, "No Solutions in Sight: The Problem of Protracted Refugee Situations in Africa" in Itaru Ohta & Yntiso D Gebre, eds, *Displacement Risks in Africa: Refugees, Resettlers and Their Host Population* (Kyoto, Melbourne: Kyoto University Press, Trans Pacific Press, 2005) 17; Robin Ramcharan, "The African Refugee Crisis: Contemporary Challenges to the Protection of Refugees and Displaced Persons in Africa" (2000) 8 *African Yearbook of International Law* 119; Bonaventure Rutinwa, "The End of Asylum? The Changing Nature of Refugee Policies in Africa" (2002) 21:1-2 *Refugee Survey Quarterly* 12; Guglielmo Verdirame & Barbara Harrell-Bond, *Rights in Exile: Janus-Faced Humanitarianism* (New York: Berghahn Books, 2005).
 - ² 10 September 1969, 1001 UNTS 45, 8 ILM 1288 (entered into force 20 June 1974) [*1969 Convention*]. Many commentators use "*OAU Convention*". "*1969 Convention*" is preferred here because the OAU no longer exists.
 - ³ See e.g. Ousmane Goundiam, "African Refugee Convention" [1970] 2 *Migration News* 7; Paul Weis, "The Convention of the Organisation of African Unity Governing the Specific Aspects of Refugee Problems in Africa" (1970) 3:3 *Revue des droits de l'homme* 449 [Weis, "The Convention"].
 - ⁴ See e.g. 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) 20:1 *Refugee Survey Quarterly* 79; Joe Oloka-Onyango, "Human Rights, the OAU Convention and the Refugee Crisis in Africa: Forty Years After Geneva" (1991) 3:3 *Int'l J Refugee L* 453 [Oloka-Onyango, "Forty Years After"]; Micah Bond Rankin, "Extending the Limits or Narrowing the Scope? Deconstructing the OAU Refugee Definition Thirty Years On" (2005) 21:3 *SAJHR* 406; MR Rwelamira, "Two Decades of the 1969 OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa" (1989) 1:4 *Int'l J Refugee L* 557; Ray Wilkinson, "Thirty Years Later..." *Refugees* 2:115 (1999) 4.
 - ⁵ Rankin, *supra* note 4 at 410. See e.g. Jennifer L Turner, "Liberian Refugees: A Test of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa" (1994) 8:2 *Geo Immig LJ* 281.
 - ⁶ See e.g. Rainer Hofmann, "Refugee Law in the African Context" (1992) 52 *Heidelberg J Int'l L* 318; Christopher J Bakwesegha, "The OAU and African Refugees" in Yassin El-Ayouty, ed, *The Organization of African Unity After Thirty Years* (Westport, Conn: Praeger, 1994) 77.

tion framework that the convention establishes.⁷ Africa is the only region of the developing world to have adopted a binding, regional refugee legal instrument, and it hosts almost a quarter of the world's refugees,⁸ yet the *1969 Convention* remains poorly understood or misunderstood.⁹

This article on the *1969 Convention* seeks to contribute to remedying this problem. It is characterized by its alternative approach. While recognizing the *1969 Convention's* significant contributions to refugee protection in Africa, this paper focuses equally on *what the 1969 Convention is not*—in terms of both widely held misconceptions about it and omissions from it—as opposed to the usual approach that focuses almost exclusively on *what the 1969 Convention is*. The paper begins by surveying the elements of the *1969 Convention* that are commonly hailed as its major legal innovations: its unique refugee definition, its progressive development of an individual right to asylum, the broadened nature of *non-refoulement* under the convention, and its formalization of responsibility sharing, a type of temporary protection, and voluntary repatriation. This part provides an overview of the convention while at the same time surveying much of the literature on the *1969 Convention*. The paper then goes on to address the most misunderstood of these innovations—the unique refugee definition—in greater depth, with an emphasis on dispelling the most common misconception surrounding the definition: that it is much broader than the refugee definition found in the *1951 Convention Relating to the Status of Refugees*¹⁰ (*1951 Convention*). Finally, the paper investigates a glaring yet often overlooked omission: the *1969 Convention's* silence regarding refugees' civil and political, as well as socio-economic rights, and how the African convention works as the “regional complement”¹¹ to the universal refugee instrument in that regard. In so doing, this paper argues that refugees recognized only under the *1969 Convention* (whether for practical reasons or because they do not meet the *1951 Convention* refugee definition) are nevertheless entitled to the same standards of

⁷ Pieces by Okoth-Obbo (*supra* note 4), Edwards (Alice Edwards, “Refugee Status Determination in Africa” (2006) 14 *African Journal of International and Comparative Law* 204 [Edwards, “Refugee Status Determination”]), and Rankin (*supra* note 4) are notable exceptions.

⁸ According to the US Committee for Refugees and Immigrants, as of 31 December 2008, there were 2,959,900 refugees in Africa, out of a global refugee population of 13,599,900 (“Refugees and Asylum Seekers Worldwide”, online: World Refugee Survey: 2009 <<http://www.refugees.org/resources/refugee-warehousing/archived-world-refugee-surveys/2009-world-refugee-survey.html>>).

⁹ See Edwards, “Refugee Status Determination”, *supra* note 7 at 207; Rankin, *supra* note 4 at 407, 415.

¹⁰ 28 July 1951, 189 UNTS 137, Can TS 1969 No 6 (entered into force 22 April 1954) [*1951 Convention*].

¹¹ *1969 Convention*, *supra* note 2, art VIII(2).

treatment as refugees recognized under the *1951 Convention*. Taken together, this paper's survey of the innovations in, misconceptions about, and omissions from the *1969 Convention* provides a unique critical overview of the African refugee protection regime.

The critical approach adopted here should not be taken to suggest that the *1969 Convention* should be interpreted in any way other than in good faith and in line with its object and purpose,¹² the humanitarian nature of which is made explicit in the convention's preamble.¹³ Rather, the overarching purpose of this paper is to form part of a movement toward more serious, critical legal engagement with the *1969 Convention* and with refugee protection in Africa more generally. There is a remarkable dearth of critical legal analysis of the *1969 Convention*,¹⁴ which is all the more stark in relation to the sheer volume of analysis to which the *1951 Convention* has been subject.¹⁵ Serious academic analysis of the *1969 Convention* is a critical component of full engagement with it as a tool of refugee protection. Indeed, Rankin maintains that the failure to provide an interpretive framework for the *1969 Convention* "may ultimately undermine the flexibility of the [refugee] definition by limiting the situations in which it can be applied."¹⁶ If the *1969 Convention* begins to receive even a fraction of the critical attention that has been devoted to its universal counterpart, it will represent an important contribution to the legal protection of refugees in Africa at a time when such a contribution is sorely needed.

¹² See *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, art 31(1), Can TS 1980 No 37 (entered into force 27 January 1980) [VCLT].

¹³ Preambular paragraph 1 describes signatories as "[n]oting 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." Preambular paragraph 2 recognizes "the need for an essentially humanitarian approach towards solving the problems of refugees" (*1969 Convention*, *supra* note 2).

¹⁴ See Edwards, "Refugee Status Determination", *supra* note 7 at 207; Rankin, *supra* note 4 at 407, 415.

¹⁵ See e.g. Michelle Foster, *International Refugee Law and Socio-economic Rights: Refuge from Deprivation* (Cambridge, UK: Cambridge University Press, 2007); Guy S Goodwin-Gill & Jane McAdam, *The Refugee in International Law*, 3d ed (Oxford: Oxford University Press, 2007); Atle Grahl-Madsen, *The Status of Refugees in International Law*, vols 1 & 2 (Leiden: AW Sijthoff, 1966, 1972); James C Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) [Hathaway, *Refugee Status*]; P Weis, "Legal Aspects of the Convention of 25 July 1951 Relating to the Status of Refugees" [1953] *Brit YB Int'l L* 478; Andreas Zimmermann, ed, *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford: Oxford University Press, 2011).

¹⁶ *Supra* note 4 at 415.

I. Innovations

The *1969 Convention* is the regional legal instrument governing refugee protection in Africa. It was adopted on 10 September 1969 at the sixth ordinary session of the OAU's Assembly of Heads of State and Government, when it was signed by forty-one heads of state or government. It entered into force on 20 June 1974¹⁷ after ratification by one-third of OAU member states.¹⁸ It has since been ratified by forty-five of the fifty-four member states of the African Union (AU),¹⁹ the successor organization to the OAU.

A. Overview of the 1969 Convention

The *1969 Convention* is a relatively short instrument, containing a preamble and fifteen articles. The first article provides two refugee definitions, which are discussed in detail below,²⁰ and includes paragraphs on cessation²¹ and exclusion.²² These two paragraphs closely follow the *1951 Convention* provisions, with three additions. Two additional cessation clauses provide that the *1969 Convention* shall cease to apply to any refugee who has "committed a serious non-political crime outside his country of refuge after his admission to that country as a refugee"²³ or has "seriously infringed" the *1969 Convention's* purposes and objectives.²⁴ A further point of distinction is that the *1969 Convention* does not include the clause present in the *1951 Convention* preventing cessation in respect of a refugee who can "invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality."²⁵ Finally, an additional exclusion clause adds "acts contrary to the purposes and principles of the OAU as a further ground for exclusion."²⁶

¹⁷ A day that later became both Africa, and World, Refugee Day.

¹⁸ *1969 Convention*, *supra* note 2, art XI.

¹⁹ Eritrea, São Tomé & Príncipe, the Sahrawi Arab Democratic Republic (SADR), and South Sudan have neither signed nor ratified the *1969 Convention*; nor is Morocco a party to the convention, having withdrawn from the OAU in 1985 after the SADR was accepted as a member state. Djibouti, Madagascar, Mauritius, Namibia, and Somalia have signed, but not ratified, the convention.

²⁰ See Parts I.B and II.

²¹ *1969 Convention*, *supra* note 2, art I(4).

²² *Ibid.*, art I(5).

²³ *Ibid.*, art I(4)(f).

²⁴ *Ibid.*, art I(4)(g).

²⁵ *1951 Convention*, *supra* note 10, art 1C(5).

²⁶ *1969 Convention*, *supra* note 2, art I(5)(c).

Article II of the *1969 Convention* relates to asylum; each of its paragraphs is addressed in detail below.²⁷ The third article articulates refugees' duty to respect the laws and regulations of the host state, echoing article 2 of the *1951 Convention*, and prohibits them from engaging in subversive activities against any OAU member state. States party to the convention undertake to support this duty by prohibiting refugees "residing in their respective territories from attacking any State Member of the OAU, by any activity likely to cause tension between Member States."²⁸ The prohibition on subversive activities is operationalized by the cessation clauses described above, which terminate the refugee status of an individual who commits a serious non-political crime after the acquisition of such status or who has seriously infringed the *1969 Convention's* purposes and objectives. Article IV, on non-discrimination in the application of the convention, follows article 3 of the *1951 Convention*, however discrimination is prohibited on the additional grounds of nationality, membership of a particular social group, or political opinion.²⁹ The fifth article relates to voluntary repatriation, which is addressed in detail below.³⁰ Article VI, like article 28 of the *1951 Convention*, mandates that contracting states provide refugees with travel documents. In view of article II(5), on temporary protection, which is discussed in detail below, article VI(2) provides, "Where an African country of second asylum accepts a refugee from a country of first asylum, the country of first asylum may be dispensed from issuing a document with a return clause." Articles VII and VIII relate to state co-operation with the OAU and the office of the United Nations High Commissioner for Refugees (UNHCR), respectively. Article VIII(2) provides that the *1969 Convention* "shall be the effective regional complement in Africa" of the *1951 Convention*. This clause is analyzed in detail below.³¹ The final seven articles are technical provisions.

It is apparent that many of the *1969 Convention's* eight substantive provisions represent significant departures from the *1951 Convention*. This reflects the *1969 Convention's* objective, as announced by its title: to address aspects of the refugee problem singular to Africa. Indeed, Rwelamira explains that the final text of the *1969 Convention* "settled for only the specific aspects of the African [refugee problem] which were not

²⁷ See Parts I.C–I.E.

²⁸ *1969 Convention*, *supra* note 2, art III(2).

²⁹ The *1951 Convention* prohibits discrimination on the grounds of race, religion, or country of origin (*supra* note 10, art 3).

³⁰ See Part I.E.

³¹ See Part III.C.

adequately catered for under the 1951 Convention.”³² Accordingly, many of the *1969 Convention*’s provisions are considered major innovations in the field of refugee law. Each innovation is surveyed below.

B. A Unique Refugee Definition

The *1951 Convention* defines a refugee as someone with a well-founded fear of persecution on the basis of his or her race, religion, nationality, membership of a particular social group, or political opinion.³³ The *1969 Convention* includes that same definition³⁴—minus the 1 January 1951 date limit in the *1951 Convention* that most states later agreed, by way of the *1967 Protocol*,³⁵ not to apply—and provides at article I(2):

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.

Both definitions are employed by UNHCR in its operations in Africa,³⁶ though given the relative ease of applying the *1969 Convention*’s article I(2) in the situations of mass influx that so often characterize refugee movements in Africa,³⁷ in practice, UNHCR and states often recognize

³² Medard RK Rwelamira, “Some Reflections on the OAU Convention on Refugees: Some Pending Issues” (1983) 16:2 *Comp & Int’l LJS Afr* 155 at 167 [Rwelamira, “Some Reflections”].

³³ *1951 Convention*, *supra* note 10, art 1A, which provides:
[T]he term “refugee” shall apply to any person who:

...

(2) ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

³⁴ *1969 Convention*, *supra* note 2, art I(1).

³⁵ *Protocol Relating to the Status of Refugees*, 31 January 1967, 606 UNTS 267, art 1(2), Can TS 1969 No 29 (entered into force 4 October 1967) [*1967 Protocol*].

³⁶ See Emmanuel Opoku Awuku, “Refugee Movements in Africa and the OAU Convention on Refugees” (1995) 39:1 *J Afr L* 79 at 81; UNHCR, Executive Committee of the High Commissioner’s Programme, *Note on International Protection*, 45th Sess, UN Doc A/AC.96/830, (7 September 1994) at para 32 [mimeo].

³⁷ See Part II.C.

refugees in Africa only under article I(2), even though the *1951 Convention's* refugee definition may equally apply.

The *1969 Convention's* additional refugee definition will be addressed at length below, as part of the analysis of common misconceptions surrounding it.³⁸ For the moment, it suffices to note that article I(2) of the *1969 Convention* explicitly introduces objective criteria, based on the conditions prevailing in the country of origin, for determining refugee status,³⁹ and “requires neither the elements of deliberateness nor discrimination inherent in the 1951 Convention definition.”⁴⁰ Additionally, article I(2) was globally influential in that it contributed to the 1984 adoption of the Cartagena Declaration, which recommended that the traditional refugee definition be expanded in Latin America to include

persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.⁴¹

Furthermore, UNHCR's Executive Committee of the High Commissioner's Programme (ExCom) concluded that the *1951 Convention* refugee definition should be broadened to take account of mass displacement, and in so doing used—without attribution—the exact wording of the *1969 Convention's* article I(2).⁴²

C. *Advancing an Individual Right to Asylum?*

Asylum is “the first and most fundamental of the refugee's needs and to grant him this constitutes the preliminary condition for him to have all the other rights.”⁴³ The *1951 Convention* does not, however, establish any individual right to asylum. The *Universal Declaration of Human Rights (UDHR)*, by contrast, enshrines the right of individuals to “seek and to en-

³⁸ See Part II.

³⁹ See Weis, “The Convention”, *supra* note 3 at 455.

⁴⁰ Ruma Mandal, “Protection Mechanisms Outside of the 1951 Convention (‘Complementary Protection’)”, Legal and Protection Policy Research Series, (Geneva: UNHCR Department of Internal Protection, 2005) at 13, online: UNHCR: The UN Refugee Agency <<http://www.unhcr.org/435df0aa2.pdf>>.

⁴¹ OAS, *Annual Report of the Inter-American Commission on Human Rights, 1984-1985*, OR OEA/Ser.L/V/II.66/Doc.10, rev.1 (1985) chapter V(IV), “Declaration of Cartagena” at para 3.

⁴² See Richard Greenfield, “The OAU and Africa's Refugees” in Yassin El-Ayouty & I William Zartman, eds, *The OAU After Twenty Years* (New York: Praeger, 1984) 209 at 224.

⁴³ Goundiam, *supra* note 3 at 9.

joy” asylum,⁴⁴ but stops short of recognizing any individual right to asylum at international law. The UN *Declaration on Territorial Asylum*⁴⁵—which is recalled at paragraph 7 of the preamble to the *1969 Convention*—is similarly circumscribed. This resolution was followed, ten years after its adoption, by the UN Conference on Territorial Asylum, which failed to recognize or codify any individual right to asylum.⁴⁶ In 1981, however, the *African Charter on Human and Peoples’ Rights (African Charter)* recognized for the first time the right of persecuted individuals to “seek and obtain asylum.”⁴⁷ The ramifications of this provision have yet to be analyzed in depth, and it is beyond the scope of this paper to do so here. Suffice it to note that, despite the *African Charter’s* advance, the general consensus remains that the grant of asylum is within the exclusive discretion of states; as they have no obligation to grant it, individuals have no right to asylum corresponding to their *UDHR* right to “seek and to enjoy” it.⁴⁸

While the *1969 Convention* reflects this general consensus, it nevertheless significantly “strengthens the institution of asylum”⁴⁹ by providing:

Member States of the OAU shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.⁵⁰

This urging of states to grant asylum is “a further inroad into the traditional international law perspective which has tended to regard asylum as an exclusive right of the sovereign state,” but is “certainly not a right to be enforced by an individual against a state.”⁵¹ The convention does not stop there; mirroring part of the preamble to the UN *Declaration on Territorial*

⁴⁴ GA Res 217(III)(A), UNGAOR, 3d Sess, UN Doc A/810, (1948) 71, art 14(1). See generally Alice Edwards, “Human Rights, Refugees, and the Right ‘To Enjoy’ Asylum” (2005) 17:2 Int’l J Refugee L 293.

⁴⁵ GA Res 2312 (XXII), UNGAOR, 22d Sess, Supp No 16, UN Doc A/6716, (1967) 81.

⁴⁶ See Hathaway, *Refugee Status*, *supra* note 15 at 13-16; Agnès Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford: Oxford University Press, 2009) at 21-23.

⁴⁷ 27 June 1981, 1520 UNTS 217, art 12(3), 21 ILM 58 (entered into force 21 October 1986) [emphasis added].

⁴⁸ See Goodwin-Gill & McAdam, *supra* note 15 at 358; P Weis, “The United Nations Declaration on Territorial Asylum” (1969) 7 Can YB Int’l Law 92 at 137-39.

⁴⁹ Hofmann, *supra* note 6 at 324.

⁵⁰ *1969 Convention*, *supra* note 2, art II(1). Presumably, “well-founded reasons” must be read as referring to both the article I(1) and article I(2) refugee definitions, despite the fact that only article I(1) explicitly includes a requirement that the reasons for flight be well-founded.

⁵¹ Rwelamira, “Some Reflections”, *supra* note 32 at 170.

Asylum, it characterizes the grant of asylum as a “peaceful and humanitarian act” that “shall not be regarded as an unfriendly act by any Member State.”⁵² The language encouraging states to grant asylum is, however, only recommendatory. Thus the *1969 Convention* incrementally advances, but does not enshrine, an individual right to asylum.⁵³

D. Broadened Non-refoulement?

While the *1969 Convention*'s contribution to the advancement of an individual right to asylum may be characterized as modest, its role regarding *non-refoulement*—a major aspect of the concept of asylum—is somewhat more significant. The general rule of *non-refoulement* provides that an individual should not be returned to a state where there is a real chance that he or she will face persecution, other ill-treatment, or torture. This principle is codified in, or has been judicially read into, a number of international refugee⁵⁴ and human rights instruments.⁵⁵ Most commentators even view the norm as having the status of customary international law.⁵⁶ Human rights-based *non-refoulement* is discussed below;⁵⁷ the focus here is on *non-refoulement* under refugee law. In that context, the norm as articulated at article 33(1) of the *1951 Convention*, prohibits states from returning a refugee to territory where there is a risk that his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group, or political opinion. The second paragraph of article 33, however, permits a national security exception.

⁵² *1969 Convention*, *supra* note 2, art II(2).

⁵³ See Rachel Murray, *Human Rights in Africa: From the OAU to the African Union* (Cambridge, UK: Cambridge University Press, 2004) at 189 [Murray, *Human Rights in Africa*].

⁵⁴ See e.g. *1951 Convention*, *supra* note 10, art 33; *1969 Convention*, *supra* note 2, art II(3).

⁵⁵ See e.g. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85, art 3, Can TS 1987 No 36 (entered into force 26 June 1987); *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, art 7, Can TS 1976 No 47 (entered into force 23 March 1976).

⁵⁶ See e.g. Sir Elihu Lauterpacht & Daniel Bethlehem, “The Scope and Content of the Principle of *Non-refoulement*: Opinion” in Erika Feller, Volker Türk & Frances Nicholson, eds, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge, UK: Cambridge University Press, 2003) 87 at 140-63. *Contra* James C Hathaway, “Leveraging Asylum” (2010) 45:3 *Tex Int'l LJ* 503.

⁵⁷ See Part III.A.

The 1969 Convention's *non-refoulement* provision closely follows article 3(1) of the UN *Declaration on Territorial Asylum*.⁵⁸ The 1969 Convention provides:

No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.⁵⁹

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

First, the 1969 Convention expands *non-refoulement* because it does not include a national security exception like the one found in its universal counterpart. However it does not render *non-refoulement* absolute, as many scholars have suggested.⁶⁰ Pursuant to articles I(4)(f) and (g), the application of the 1969 Convention, and hence protection from *refoulement*, ceases if the individual concerned commits a serious non-political crime outside the country of refuge after admission as a refugee or seriously infringes the convention's purposes and objectives. This, according to D'Sa, implies that the 1969 Convention, like the 1951 Convention, allows expulsion in limited circumstances, "although the OAU appears to deal with the latter somewhat indirectly."⁶¹

Second, the 1969 Convention's *non-refoulement* provision applies at frontiers, while the 1951 Convention makes no such explicit provision. As a result, many commentators view *non-refoulement* under the 1969 Convention as broader than under the 1951 Convention.⁶² State practice, however, has aligned the universal refugee regime with the standard of the

⁵⁸ See Weis, "The Convention", *supra* note 3 at 457.

⁵⁹ 1969 Convention, *supra* note 2, art II(3).

⁶⁰ See e.g. Georges Abi-Saab, "The Admission and Expulsion of Refugees with Special Reference to Africa" (2000) 8 African Yearbook of International Law 71 at 90; Mandal, *supra* note 40 at 15; Rachel Murray, "Refugees and Internally Displaced Persons and Human Rights: The African System" (2005) 24:2 Refugee Survey Quarterly 56 at 57.

⁶¹ Rose M D'Sa, "The African Refugee Problem: Relevant International Conventions and Recent Activities of the Organization of African Unity" (1984) 31 Nethl Int'l L Rev 378 at 388.

⁶² See e.g. Abi-Saab, *supra* note 60 at 89; Nlerum S Okogbule, "The Legal Dimensions of the Refugee Problem in Africa" (2004) 10:2 East African Journal of Peace & Human Rights 176 at 184; UNHCR, *The State of the World's Refugees, 2000: Fifty Years of Humanitarian Action* (np: Oxford University Press, [nd]) at 57, online: UNHCR: The UN Refugee Agency <<http://www.unhcr.org/4a4c754a9.html>>; Jacob van Garderen & Julie Ebenstein, "Regional Developments: Africa" in Zimmermann, *supra* note 15, 185 at 186.

1969 Convention. According to Goodwin-Gill and McAdam, “By and large, States in their practice and in their recorded views, have recognized that *non-refoulement* applies to the moment at which asylum seekers present themselves for entry, either within a State or at its border.”⁶³ At present, therefore, the *1969 Convention*’s conception of *non-refoulement* is no broader than that of the *1951 Convention* as far as applicability at frontiers is concerned.

E. Formalization of Responsibility Sharing, Temporary Protection, and Voluntary Repatriation

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

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

Such “appropriate measures” include regional resettlement, financial support, and political responsibility sharing. Each possible method of responsibility sharing has, however, been constrained in practice by the limited resources of African states.⁶⁴

Temporary protection describes a variety of practices. Fitzpatrick describes it as “a magic gift, assuming the desired form of its enthusiasts’ policy objectives.”⁶⁵ The dual meaning attributed to the notion of temporary protection articulated in the *1969 Convention* reflects Fitzpatrick’s description. The concept finds expression at article II(5), which provides, “Where a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his re-settlement.” York University’s Centre for Refugee Studies interpreted article II(5) as implying that the nature of the protection granted under the *1969 Convention* is of limited duration:

⁶³ *Supra* note 15 at 208.

⁶⁴ See Jean-Francois Durieux & Agnès Hurwitz, “How Many Is Too Many? African and European Legal Responses to Mass Influxes of Refugees” (2004) 47 *German Yb Int’l L* 105 at 128-29.

⁶⁵ Joan Fitzpatrick, “Temporary Protection of Refugees: Elements of a Formalized Regime” (2000) 94:2 *AJIL* 279 at 280.

The debate about temporary *versus* permanent refugee protection has no real currency in the South, where protection has almost always been assumed to be temporary, even if it lasted for a long time. Protection has usually been provided by neighbouring countries with the clear understanding that the refugees would eventually return home. In fact, in Africa, temporary protection is not only common practice, it is given prominence in the Organi[z]ation of African Unity's 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa, Article 11(5) [*sic*].⁶⁶

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

applies to persons who have been recognised as refugees but for one reason or another have not been granted the right of residence for any duration at all. It is not intended to determine the duration of residence for all refugees who have been recognised and granted asylum. ... [Furthermore,] where a person is resettled from one African country to another on account of the first country not being able to continue to provide him or her asylum, the function of resettlement in this case is not to terminate but to continue the refugee status of that person but in a different country.⁶⁷

Put this way, it becomes clear that the *1969 Convention's* notion of temporary protection is more akin to responsibility sharing than it is to later versions of temporary protection designed to limit states' obligations toward refugees. Under the *1969 Convention*, it is the sojourn in the first country of asylum, not the protection, that is temporary.⁶⁸

While the notion of temporary protection articulated by the *1969 Convention* is a humanitarian one,⁶⁹ it seems premised on an idea that is fundamentally less so. Article II(5) exists to remedy a situation where a refugee has received asylum but no corresponding right of residence. That a refugee could be recognized as such but could also be lawfully deprived of a right of residence must be queried. A state's realization of its obligations

⁶⁶ Centre for Refugee Studies Refugee Research Unit, York University, "The Temporary Protection of Refugees: A Solution-Oriented and Rights Regarding Approach", Discussion Paper, (1996) IV.A at 22 [unpublished], cited in Bonaventure Rutinwa, "Prima Facie Status and Refugee Protection", New Issues in Refugee Research Working Paper No 69, (Geneva: UNHCR Evaluation and Policy Analysis Unit, 2002) at 16, online: UNHCR: The UN Refugee Agency <<http://www.unhcr.org/3db9636c4.pdf>> [Rutinwa, "Prima Facie Status"].

⁶⁷ Rutinwa, "Prima Facie Status", *supra* note 66 at 16.

⁶⁸ See *ibid.*

⁶⁹ Indeed, temporary protection under the *1969 Convention* was likely premised on the need to protect refugees in so-called front-line states from incursions by South African state agents, who regularly pursued anti-apartheid activists into their countries of refuge.

under the *1951 Convention*—which applies co-extensively with the *1969 Convention*⁷⁰—to ensure refugees’ rights clearly depends on the refugees’ presence in the territory of the asylum state.⁷¹ Indeed, article II(1), in urging states to grant asylum, conceives of such asylum in terms of reception and securing the “settlement” of refugees.

Article V of the *1969 Convention* addresses voluntary repatriation. Its first paragraph articulates the core principle: “The essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will.” This principle is an important corollary of article II’s provisions on asylum, particularly article II(3) on *non-refoulement*. The clauses that follow the core principle are premised on the assumption that the conditions for safe return have been met⁷² and detail the duties of countries of asylum and origin and refugee-assisting agencies. The sending state, in collaboration with the receiving state, must “make adequate arrangements for the safe return of refugees who request repatriation,”⁷³ while the country of origin must “facilitate their resettlement and grant them the full rights and privileges of nationals of the country, and subject them to the same obligations.”⁷⁴ The convention mandates countries of asylum, countries of origin, voluntary agencies, and international and intergovernmental organizations to assist refugees with the process of return.⁷⁵ It provides in particular that states of origin should use the news media and the OAU to invite refugees home, and should provide assurances regarding the circumstances prevailing there, and that host countries should ensure that such information is received.⁷⁶ Article V also provides that, upon return, refugees must not be penalized for having fled.⁷⁷

The *1969 Convention* is the first, and remains the only, international legal instrument to formally insist on the voluntariness of refugee repatriation;⁷⁸ however, previous articulations of the concept appear in the

⁷⁰ See Part III.

⁷¹ See Violeta Moreno-Lax, “Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea” (2011) 23:2 *Int’l J Refugee L* 174 at 204-205.

⁷² See Okoth-Obbo, *supra* note 4 at 126.

⁷³ *1969 Convention*, *supra* note 2, art V(2).

⁷⁴ *Ibid.*, art V(3).

⁷⁵ *Ibid.*, art V(5).

⁷⁶ *Ibid.*, art V(4).

⁷⁷ *Ibid.*

⁷⁸ See “Voluntary Repatriation: International Protection”, Handbook, (Geneva: United Nations High Commissioner for Refugees, 1996) annex 3, online: UNHCR: The UN Refugee Agency <<http://www.unhcr.org/3bfe68d32.pdf>>.

UNHCR statute,⁷⁹ an early UN General Assembly resolution,⁸⁰ and the constitution of the International Refugee Organization,⁸¹ the predecessor institution to UNHCR. Furthermore, that repatriation should be voluntary is evidenced by state practice.⁸² Its originality aside, article V(1) is a “powerful statement of principle,”⁸³ which despite isolated critiques,⁸⁴ is hailed as representing an early articulation of a principle that became a cornerstone of the international regime for refugee protection.⁸⁵ Unfortu-

⁷⁹ *Statute of the Office of the United Nations High Commissioner for Refugees*, GA Res 428(V), UNGAOR, 5th Sess, Supp No 20, UN Doc A/1775, (1950) 46, Annex, art 1.

⁸⁰ *Question of Refugees*, GA Res 8(I), UNGAOR, 1st Sess, UN Doc A/64, (1946) 12.

⁸¹ *Constitution of the International Refugee Organization*, 15 December 1946, 18 UNTS 3, art 2(1)(a), Can TS 1946 No 47 (entered into force 20 August 1948).

⁸² For example, in an agreement between Afghanistan and Pakistan, the latter agreed to facilitate “voluntary, orderly and peaceful repatriation” (*Bilateral Agreement Between the Republic of Afghanistan and the Islamic Republic of Pakistan on the Voluntary Return of Refugees*, 14 April 1988, 27 ILM 585, art III, cited in Goodwin-Gill & McAdam, *supra* note 15 at 495). Unfortunately, however, that repatriation should be voluntary is a principle that, in Africa, is often honoured in the breach: see generally Cristiano d’Orsi, “Sub-Saharan Africa: Is a New Special Regional Refugee Law Regime Emerging?” (2008) 68 Heidelberg J Int’l L 1057.

⁸³ Durieux & Hurwitz, *supra* note 64 at 130.

⁸⁴ Barutciski argues that the standard introduced by article V(1) is incoherent:

There are at least two ways to read this provision. If the two phrases of this sentence are meant to be read separately, the first phrase ignores the possibility of involuntary repatriation when a person is no longer a refugee according to the cessation clause found in article I(4)(e). The second phrase may suggest, *a contrario*, that refugees can be voluntarily repatriated, which is clearly not the case given the inclusion of the term ‘refugee’ which applies only to individuals who have reason to fear danger, and who are protected under the OAU Convention’s *non-refoulement* guarantee. If the drafters intended that the two phrases of this sentence be read jointly in order to establish a single standard that relates to persons who satisfy the refugee definition, then the latter inconsistency still applies and a coherent provision would have stated that ‘no refugee shall be repatriated’, regardless of whether it is against his or her will (Michael Barutciski, “The Development of Refugee Law and Policy in South Africa: A Commentary on the 1997 Green Paper and 1998 White Paper/Draft Bill” (1998) 10:4 Int’l J Refugee L 700 at 718 [footnote omitted]).

Article V(1)’s punctuation suggests that the drafters intended Barutciski’s second reading, and in that context, “refugee” should be interpreted to imply an individual who was recognized as a refugee but who, at the time of repatriation, falls into the category of person described at article I(4)(e), whether or not the cessation clause has actually been invoked.

⁸⁵ Voluntary repatriation is one of UNHCR’s trifecta of “durable solutions” for refugees; the others are local integration and resettlement. It should be noted, however, that voluntary repatriation is a concept that is mostly meaningful to UNHCR, as its absence from the 1951 Convention means that states not party to the 1969 Convention are not bound by it: see generally Marjoleine Zieck, *UNHCR and Voluntary Repatriation of Refugees: A Legal Analysis* (The Hague: Martinus Nijhoff, 1997).

nately, it has been misinterpreted to suggest that repatriation is the primary solution for refugees on the continent.⁸⁶ Rutinwa explains that, in fact, article V is “much more about elaborating the principles and the modalities of effecting voluntary repatriation than a prescription of it as the only solution.”⁸⁷

The *1969 Convention* introduced several important legal innovations. It included a new refugee definition, advanced an individual right to asylum, broadened the norm of *non-refoulement* somewhat, and formalized the concepts of responsibility sharing, temporary protection, and voluntary repatriation. The preceding part detailed the latter three innovations and highlighted the ways in which some of them have been misunderstood. By far the most misunderstood legal innovation of the *1969 Convention*, however, is its unique refugee definition, to which the following part is devoted.

II. Misconceptions

The article I(2) refugee definition is without a doubt the most celebrated feature of the *1969 Convention*. Okoth-Obbo notes that the provision has “generated a reputation which borders [*sic*] on the mythical.”⁸⁸ However, the provision’s mythical status is arguably the result of several misconceptions about it, which taken together, have led to a somewhat erroneous “interpretive consensus”⁸⁹ characterized by the almost universal propensity to view the article I(2) refugee definition as remarkably “expansive”,⁹⁰ “extensive”,⁹¹ “wide”,⁹² or “broad”,⁹³ especially in relation to the *1951 Convention* refugee definition.⁹⁴ This interpretive consensus has precluded critical analysis, thereby perpetuating the misunderstanding. Indeed, according to Rankin, the focus in the literature on the definition’s broadness “tends to gloss over ... [its] vagueness and ambiguity.”⁹⁵

⁸⁶ Rutinwa, “Prima Facie Status”, *supra* note 66 at 15-16.

⁸⁷ *Ibid* at 16.

⁸⁸ *Supra* note 4 at 109.

⁸⁹ Rankin, *supra* note 4 at 410, 414.

⁹⁰ See e.g. Okogbule, *supra* note 62 at 183; Hofmann, *supra* note 6 at 323; Turner, *supra* note 5 at 286.

⁹¹ See e.g. Ivor C Jackson, *The Refugee Concept in Group Situations* (The Hague: Martinus Nijhoff, 1999) at 177.

⁹² See e.g. Awuku, *supra* note 36 at 82; Okoth-Obbo, *supra* note 4 at 112.

⁹³ See e.g. Eduardo Arboleda, “Refugee Definition in Africa and Latin America: The Lessons of Pragmatism” (1991) 3:2 *Int’l J Refugee L* 185 at 194.

⁹⁴ See Okoth-Obbo, *supra* note 4 at 117.

⁹⁵ *Supra* note 4 at 410.

While the article I(2) refugee definition has certainly extended international protection to individuals who would not otherwise qualify for refugee status,⁹⁶ it is not necessarily quite as inclusive or broad as most commentators suggest;⁹⁷ indeed, the analysis below suggests that the *1969 Convention's* unique refugee definition likely only extends refugee protection incrementally. The handful of scholars who have engaged in serious critical analysis of the *1969 Convention* have identified three particularly common misconceptions about the article I(2) refugee definition, which contribute to the flawed interpretive consensus about the definition's breadth: first, that all four events justifying flight under the *1969 Convention* (1969 Events) remain equally relevant today;⁹⁸ second, that the article I(2) refugee definition is entirely objective;⁹⁹ and third, that it applies only to groups¹⁰⁰ or was drafted with a view to promoting the group determination of refugee status.¹⁰¹ Each of these misconceptions is addressed in turn below.

A. Continued Relevance of All 1969 Events?

There is little consensus regarding the meaning of each of the 1969 Events—external aggression, occupation, foreign domination, and events seriously disturbing public order—which “lacked a firm definition under international law”¹⁰² when the *1969 Convention* was drafted and adopted. Since then, scholars have made excellent efforts at elaborating the terms.¹⁰³ Ultimately, however, any authoritative consensus around their meaning will depend on the weight of reported judicial interpretation, of which there is a paucity in Africa, and on an exhaustive survey of state practice that is beyond the scope of this paper. Accordingly, no attempt is made here to further articulate the terms' significance. Suffice it to highlight the lack of an interpretive consensus and the fact that three of the four 1969 Events—external aggression, occupation, and foreign domina-

⁹⁶ See Murray, *Human Rights in Africa*, *supra* note 53 at 188; Okoth-Obbo, *supra* note 4 at 112.

⁹⁷ See Rankin, *supra* note 4 at 410.

⁹⁸ See Okoth-Obbo, *supra* note 4 at 115-16.

⁹⁹ See *ibid* at 116.

¹⁰⁰ See Jean-François Durieux & Jane McAdam, “Non-refoulement Through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies” (2004) 16:1 *Int'l J Refugee L* 4 at 10.

¹⁰¹ See Durieux & Hurwitz, *supra* note 64 at 120; Okoth-Obbo, *supra* note 4 at 118; Rankin, *supra* note 4 at 410.

¹⁰² Arboleda, *supra* note 93 at 195.

¹⁰³ See e.g. Edwards, “Refugee Status Determination”, *supra* note 7; Mandal, *supra* note 40; Rankin, *supra* note 4.

tion—largely ceased to be relevant with the end of colonialism and apartheid,¹⁰⁴ narrowing the scope of the article I(2) definition.

While Okoth-Obbo argues that external aggression, occupation, and foreign domination could be viewed as “vessels still possessed of the capacity for the legal transcription of Africa’s refugee realities of today”¹⁰⁵—the war in the Democratic Republic of the Congo, in which Uganda was held to be occupying power,¹⁰⁶ comes immediately to mind—on the whole, the terms no longer carry the import that they once did. The article I(2) definition “was very appropriate ... [in the 1960s] in that it addressed the immediate concerns of people fleeing from the colonial territories ... and from the racist regimes in Southern Africa,”¹⁰⁷ but it is less relevant in the contemporary context. Indeed, Okoth-Obbo ultimately concludes that the definition “should be upgraded to more properly reflect the actual situations which today cause people to flee as refugees in Africa.”¹⁰⁸ With external aggression, occupation, and foreign domination being less relevant as causes of refugee flight today, “events seriously disturbing public order” assumes increased significance, and reaching an interpretive consensus about the term’s precise meaning becomes of even greater importance.¹⁰⁹

B. Extent of the Article I(2) Refugee Definition’s Objectivity

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

¹⁰⁴ See Edwards, “Refugee Status Determination”, *supra* note 7 at 216; Okoth-Obbo, *supra* note 4 at 115-16.

¹⁰⁵ *Ibid* at 116.

¹⁰⁶ See *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, [2005] ICJ Rep 168 at 227-31.

¹⁰⁷ Bahame Tom Mukirya Nyanduga, “Refugee Protection Under the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa” (2004) 47 *German Yb Int’l L* 85 at 92.

¹⁰⁸ *Supra* note 4 at 116. *Contra* Mandal, *supra* note 40 at 14.

¹⁰⁹ To the extent that any such consensus currently exists, it is that the events seriously disturbing public order must be generated by human activity. The article I(2) refugee definition does not permit so-called environmental refugees: Edwards, “Refugee Status Determination”, *supra* note 7 at 225-27; Hathaway, *Refugee Status*, *supra* note 15 at 16-17; Mandal, *supra* note 40 at 13-14. *Contra* Rwelamira, “Some Reflections”, *supra* note 32 at 171.

ernment's loss of authority."¹¹⁰ This outward orientation has led to a consensus among most scholars of the *1969 Convention*¹¹¹ that the article I(2) refugee definition is "based solely on objective criteria"¹¹² and therefore mandates a completely objective test of refugee status. However, this consensus is overstated for two reasons. First, the focus on the objectivity of the article I(2) refugee definition overestimates the subjectivity of the *1951 Convention* definition¹¹³ and underestimates the extent to which this universal definition can apply to victims of war and civil strife.¹¹⁴ Second, views of the article I(2) refugee definition as entirely objective overlook elements of the definition that may mandate a subjective test of refugee status.¹¹⁵ Each of these reasons is addressed in turn below.

1. Subjectivity and the *1951 Convention*

The view that the article I(2) refugee definition is objective is largely a relative one, as the regional definition is almost always assessed in relation to its universal counterpart. The latter is usually viewed as including both objective ("well-founded") and subjective ("fear") elements.¹¹⁶ Oloka-Onyango, for example, notes that

by moving away from the Geneva Convention's ' . . . well-founded fear of persecution . . . ' standard, the OAU Convention explicitly gave credence to the fact that a refugee exodus could be the result of factors of a more general nature, intrinsic to the particular country in question, rather than to the individual subjective status or fears of the refugee.¹¹⁷

Such comparisons do the *1951 Convention* refugee definition a disservice because they overemphasize its subjectivity, which some maintain was never intended. Hathaway, for example, argues that "[t]he concept of well-

¹¹⁰ *Refugee Status*, *supra* note 15 at 17.

¹¹¹ See e.g. Arboleda, *supra* note 93 at 195; Okoth-Obbo, *supra* note 4 at 112; Weis, "The Convention", *supra* note 3 at 455; WJEM van Hövell tot Westerflier, "Africa and Refugees: The OAU Refugee Convention in Theory and Practice" (1989) 7:2 *Nethl QHR* 172 at 175.

¹¹² Awuku, *supra* note 36 at 81.

¹¹³ See Rankin, *supra* note 4 at 411.

¹¹⁴ See Jackson, *supra* note 91 at 178; Okoth-Obbo, *supra* note 4 at 117.

¹¹⁵ See Edwards, "Refugee Status Determination", *supra* note 7 at 228; Okoth-Obbo, *supra* note 4 at 116; Rankin, *supra* note 4 at 412.

¹¹⁶ See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, January 1992, UN Doc HCR/IP/4/Eng/REV.1 at paras 37-38, online: UNHCR: The UN Refugee Agency <<http://www.unhcr.org/3d58e13b4.html>> [*Handbook on Refugee Status*].

¹¹⁷ "Forty Years After", *supra* note 4 at 455.

founded fear is ... inherently objective.”¹¹⁸ He maintains that the fear element was only intended to introduce a prospective risk assessment into the refugee definition.¹¹⁹ Indeed, the view that the *1951 Convention* includes a subjective element merely because it mandates an inquiry into an individual’s (objective) circumstances seems an exaggeration of the concept of subjectivity.¹²⁰ Nevertheless, leading jurisprudence¹²¹ and UNHCR’s interpretive guidance¹²² have affirmed the importance of the subjective aspect of the *1951 Convention* refugee definition. A more salient point, therefore, is the extent to which focus on the objectivity of the article I(2) refugee definition in applying it to victims of war and civil strife—who often arrive in groups—underemphasizes the extent to which the *1951 Convention* refugee definition is also applicable to such individuals. Indeed, “[t]he very existence of the OAU Convention has been used by some to justify a conservative reading of the 1951 Convention.”¹²³

The misconception that the *1951 Convention* does not apply in situations of mass influx has arisen from problematic interpretations of the *1951 Convention* both in relation to the *1969 Convention* and on its own. In the latter case, Durieux and McAdam have argued that “[t]o assert that the [1951] Convention does not apply in cases of mass influx is tantamount to saying that the individual does not exist in a group.”¹²⁴ Indeed, Kälin has argued convincingly that the *1951 Convention* can provide refugee status to individuals fleeing civil war.¹²⁵ In relation to the *1969 Con-*

¹¹⁸ *Refugee Status*, *supra* note 15 at 65.

¹¹⁹ *Ibid.*, cited in Rankin, *supra* note 4 at 411.

¹²⁰ The author is grateful to an anonymous referee for making this point.

¹²¹ See e.g. *Immigration and Naturalization Service v Cardoza-Fonseca*, 480 US 421, 94 L Ed (2d) 434 (1987), Blackmun J, concurring (“the very language of the term ‘well-founded fear’ demands a particular type of analysis—an examination of the subjective feelings of an applicant for asylum coupled with an inquiry into the objective nature of the articulated reasons for the fear” at 450) [cited to US].

¹²² *Handbook on Refugee Status*, *supra* note 116 at paras 40-41.

¹²³ Mandal, *supra* note 40 at 12.

¹²⁴ *Supra* note 100 at 9. For this reason, it is problematic to conceive of mass influx by exclusive reference to generalized conditions, thereby almost necessarily precluding the applicability of the *1951 Convention*. For example, Egli defines mass influx as “the sudden and rapid crossing of international borders by large numbers of uninvited foreigners who are seeking safety from *acute danger or other threats to their life and liberty*” (Ann Vibeke Egli, *Mass Refugee Influx and the Limits of Public International Law* (The Hague: Martinus Nijhoff, 2002) at 23 [emphasis added]). A more precise definition would include flight from persecution on a *1951 Convention* ground as one among the many factors that may cause a mass refugee influx.

¹²⁵ Walter Kälin, “Refugees and Civil Wars: Only a Matter of Interpretation?” (1991) 3:3 Int’l J Refugee L 435. See also UNHCR, *Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence*, A

vention, Jackson maintains that while the wording of the article I(2) refugee definition is certainly broader than that of the *1951 Convention*, “[t]here must ... necessarily be a considerable amount of overlapping and, as regards their practical application the difference between the two definitions is probably not as great as might at first sight appear.”¹²⁶ Okoth-Obbo endorses this view when he notes that as the article I(2) refugee definition was increasingly “pointed to as the unique example of positive law enabling the consideration of victims of war and civil strife as refugees ... the more it became possible to validate and reinforce the argument that the 1951 Convention did not apply to those categories.”¹²⁷ If the article I(2) refugee definition is continually assessed in relation to the *1951 Convention* refugee definition, and if such comparisons misunderstand the subjectivity and applicability of the *1951 Convention* refugee definition, the result is an exaggerated view of the novelty of the article I(2) refugee definition’s objectivity.

2. Subjectivity in the Test for Refugee Status Under the *1969 Convention*

It is far from clear that refugee status under the *1969 Convention* should be assessed on an entirely 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.”¹²⁸ The second, more persuasive, 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 subjective “fear” aspect of the *1951 Convention* definition. 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. This is the view of Edwards¹²⁹ and Okoth-Obbo. The latter notes:

[T]he OAU expanded definition is predicated mainly on the compulsion to leave the place of habitual residence in order to seek refuge. Ironically, in so doing, it reintroduces the problematic question of motive for flight which it is otherwise credited with having disabled from the refugee definition.¹³⁰

UNHCR Research Project, (July 2011), online: UNHCR: The UN Refugee Agency <<http://www.unhcr.org/refworld/pdfid/4e2ee022.pdf>>.

¹²⁶ *Supra* note 91 at 178.

¹²⁷ *Supra* note 4 at 117.

¹²⁸ “Refugee Status Determination”, *supra* note 7 at 228.

¹²⁹ *Ibid* at 229.

¹³⁰ Okoth-Obbo, *supra* note 4 at 116 [underlining added, italics in original].

Rankin approaches the nature of the term “compelled” with some ambivalence but concedes that it may indeed import subjectivity into the analysis:

Although compelled *may* be objective, no one has offered a satisfactory explanation for why it does not contain a subjective element. The word could relate to a subjective feeling or preference. ... 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.¹³¹

Edwards, Okoth-Obbo, and Rankin thus agree that analysis of the *1969 Convention*, to date, has overlooked the importance of the element of compulsion in the article I(2) refugee definition, thereby underestimating the role of subjectivity in determining refugee status. But what would a subjective test for refugee status under the article I(2) refugee definition actually look like? The Rankin extract above highlights the connection between, on the one hand, an objective test and the mere existence of a 1969 Event, and on the other hand, a subjective test and linkages between the refugee and such event. Edwards is more explicit about what a subjective test would entail, providing an example:

[I]t would not be unreasonable in status procedures to require a claimant from Kinshasa, DRC, to justify why he or she departed the city on the basis of generalised violence occurring in North Kivu, an area thousands of miles from the capital. In all likelihood, it would be quite difficult for him or her to prove that he or she was “compelled” to leave as a result of those events if one only considered the objective facts. Importing a subjective analysis does not mean that an individual needs to prove that flight was the *only* alternative available, but it does introduce a causal connection or nexus between the flight and the event in question.¹³²

In other words, the subjective test of refugee status under article I(2) of the *1969 Convention* is an assessment of whether the 1969 Event *caused* the individual refugee’s flight—as opposed to an objective test that looks for the mere existence of a 1969 Event in the refugee’s country of origin or nationality. Subjectivity under the *1969 Convention* is thus primarily about the nexus required between the 1969 Event and flight.

Commentary on the *1969 Convention* has rarely addressed explicitly whether a nexus between the disruptive events and flight is required. Rather, there seems to be an implicit interpretive consensus presuming that an individual would not flee a 1969 Event without a nexus between the event and a risk of harm. According to Hathaway, “Because the African

¹³¹ *Supra* note 4 at 412.

¹³² “Refugee Status Determination”, *supra* note 7 at 229-30.

standard emphasizes assessment of the gravity of the disruption of public order rather than motives for flight, individuals are largely able to decide for themselves when harm is sufficiently proximate to warrant flight.”¹³³ Implicit in this view is the assumption that, in the determination of refugee status, flight itself is sufficient evidence of the proximity of harm. 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”. These terms are additional textual elements of the article I(2) refugee definition that seem to mandate a subjective test of refugee status, because they suggest a requirement of linkages between the 1969 Event and the refugee’s flight. Indeed, the deliberate inclusion of “owing to” and “place of habitual residence” suggest that 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” or “due to”. Accordingly, under the article I(2) definition, a refugee is someone who, as a result of, or due to, a 1969 Event, is left with no choice but to flee 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 1969 Event. 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.”¹³⁴ That the article I(2) definition requires physical proximity between the putative refugee and the 1969 Event certainly suggests that the unique refugee definition demands an explicit nexus between the risk of harm and the refugee’s flight.

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”¹³⁵ the country of origin or nationality does not expand the refugee definition as much as might initially be expected. 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 an event taking place anywhere in his or her country of origin. In context, however, it becomes clear that there is “a necessary link between the asylum seeker and

¹³³ *Refugee Status*, *supra* note 15 at 18.

¹³⁴ *Supra* note 4 at 432 [emphasis added].

¹³⁵ *1969 Convention*, *supra* note 2, art I(2).

the OAU event. ... [T]he nexus is created by the fact that an asylum seeker is compelled to leave his or her *place of habitual residence*.¹³⁶ Moreover in article I(2), “either part [or] the whole of his country of origin or nationality” likely applies only to the final 1969 Event, “events seriously disturbing public order.” This is so for interpretive reasons—the lack of a comma in article I(2) between “events seriously disturbing public order” and “in either part [or] the whole of,” and the result of applying the doctrine of *ejusdem generis*¹³⁷—and because the necessity of specifying “either part [or] the whole of” attaches only to “events seriously disturbing public order.” External aggression, occupation, and foreign domination, even if only prevailing in one part of a state (most likely the capital city), will almost by definition affect the country as a whole. Edwards puts it as follows: “[T]he 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*.”¹³⁸ Thus there can be no suggestion that the inclusion of “either part [or] the whole of his country of origin or nationality” implies that a refugee may justifiably flee events that are not directly connected to him or her.

Additionally, a mere assumption that flight is necessarily the result of threatened harm does not reflect the targeted nature of the *1969 Convention*. It is axiomatic that the *1969 Convention* only extends refugee protection where such protection is necessary to safeguard a particular individual from a 1969 Event. That the convention does not extend international protection indiscriminately suggests that its refugee definition should not be applied in an indiscriminate manner. Relying solely on objective criteria to determine refugee status “could (and does) give rise to situations where asylum is sought by persons who flee for reasons unconnected to the event in question, but who can use that event to claim asylum.”¹³⁹

Thus the terms “compelled” and “owing to”, and the precise 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” and the *1969 Convention’s* obvious purpose of offering protection only to those at risk of harm, strongly suggest that, in principle, refugee status should depend on an assessed, as opposed to presumed, nexus between the 1969 Event and the refugee’s

¹³⁶ Rankin, *supra* note 4 at 434. See also van Garderen & Ebenstein, *supra* note 62 at 191.

¹³⁷ This doctrine specifies that “general words following special words are limited to the genus indicated by the special words” (Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2d ed (Manchester: Manchester University Press, 1984) at 153).

¹³⁸ “Refugee Status Determination”, *supra* note 7 at 227.

¹³⁹ *Ibid* at 230.

flight. This calls into question the sufficiency of determining refugee status on a purely objective basis, which in any case would often be little more than an exercise of determining nationality.¹⁴⁰ It is more likely that refugee status under article I(2) of the *1969 Convention* was intended to be determined both objectively—involving an assessment of whether a 1969 Event is prevailing in the country of origin or nationality—and subjectively—involving an assessment of the risk of harm that the 1969 Event actually posed to the individual concerned. Yet, it should be noted that, in specific situations where the 1969 Event is widespread and affects the whole of the country or territory from which the individual has fled, the existence of such a nexus may, purely as a matter of procedure, be presumed. Any other approach would belabour the obvious.

The view of the test for refugee status under the *1969 Convention's* unique refugee definition as both objective and subjective is bolstered by a close examination of the third common misconception about article I(2): that it applies only to groups or was drafted with a view to mandating the “group” determination of refugee status. The view that refugee status under article I(2) of the *1969 Convention* was meant to be determined on a group basis is very compatible with a completely objective assessment of the compulsion to flee, based entirely on the conditions prevailing in the country of origin or nationality. However, upon close examination, it becomes clear that the group determination of status emerged solely as a result of practical considerations and was never specifically intended. This issue and others are explored below.

C. Group Determination of Refugee Status

There are two major misconceptions about the *1969 Convention* and the group determination of refugee status. The first is highlighted by Durieux and McAdam, who assert that there is a popular perception that “the OAU Convention applies only to groups, not to individuals.”¹⁴¹ This perception is clearly erroneous for two reasons. First, the *1969 Convention* reproduces, at article I(1), the *1951 Convention* refugee definition. It is beyond dispute that this definition applies to individuals.¹⁴² Second, both the article I(1) and article I(2) refugee definitions contained in the *1969 Convention* refer to “every person”, thereby mandating the individual determination of refugee status.¹⁴³

¹⁴⁰ See *Ibid.*

¹⁴¹ *Supra* note 100 at 10.

¹⁴² See Goodwin-Gill & McAdam, *supra* note 15 at 49.

¹⁴³ See Durieux & McAdam, *supra* note 100 at 10.

The second, more common, misconception is that the *1969 Convention* was purposely designed to address situations of mass influx¹⁴⁴ and therefore provides the legal foundation for the group determination of refugee status.¹⁴⁵ Nobel, for example, notes that the convention's article I(2) refugee definition is "the legal basis for admitting refugee masses upon a group determination of their status."¹⁴⁶ Similarly, the Lawyers Committee for Human Rights maintains that the *1969 Convention* "introduced the notion of group determination of refugee status"¹⁴⁷ and suggests that "the preferable practice of group eligibility ... is provided for under the OAU Convention."¹⁴⁸ Additionally, Milner explains that

by making refugee status contingent on generalized situations in the refugee's country of origin, the 1969 OAU Convention allows states to recognize entire groups of individuals as refugees on the basis of shared characteristics and common cause of flight.¹⁴⁹

Finally, d'Orsi notes that the *1969 Convention* "is meant to promote the *prima facie* recognition of groups of refugees."¹⁵⁰

Such views are incorrect.¹⁵¹ Rather than being based on an analysis of the *1969 Convention*, they arise out of the common practice in Africa of determining refugee status on a *prima facie* basis in situations of mass influx.¹⁵² While the article I(2) refugee definition does not preclude such a practice—especially because, as compared to the *1951 Convention* definition, it includes elements that are arguably easier to apply in situations of large-scale influx¹⁵³—a close reading the *1969 Convention* reveals no specific intent to introduce or promote *prima facie* determination.¹⁵⁴ To the contrary, as noted above, the language of the convention is in the singular, providing that a refugee is "every person" who has a well-founded fear

¹⁴⁴ See Durieux & Hurwitz, *supra* note 64 at 116.

¹⁴⁵ See Okoth-Obbo, *supra* note 4 at 118; Rankin, *supra* note 4 at 416.

¹⁴⁶ Peter Nobel, "Refugees, Law, and Development in Africa" (1982) 3 Michigan YB Int'l Legal Stud 255 at 262.

¹⁴⁷ *African Exodus: Refugee Crisis, Human Rights and the 1969 OAU Convention* (New York: Lawyers Committee for Human Rights, 1995) at 5.

¹⁴⁸ *Ibid* at 22.

¹⁴⁹ James Milner, *Refugees, the State and the Politics of Asylum in Africa* (Basingstoke, UK: Palgrave Macmillan in association with St Anthony's College, Oxford, 2009) at 7.

¹⁵⁰ *Supra* note 82 at 1065.

¹⁵¹ See Durieux & Hurwitz, *supra* note 64 at 116-18; Edwards, "Refugee Status Determination", *supra* note 7 at 228; Okoth-Obbo, *supra* note 4 at 118-20; Rankin, *supra* note 4 at 416-17.

¹⁵² See *ibid* at 416.

¹⁵³ See Durieux & Hurwitz, *supra* note 64 at 116-17.

¹⁵⁴ See *ibid* at 117.

of persecution on account of a particular characteristic¹⁵⁵ or who was compelled to leave his or her country of origin or nationality as a result of a 1969 Event.¹⁵⁶ Furthermore, the *1969 Convention* is not unique in its applicability in situations of mass influx. Durieux and McAdam maintain that the *1951 Convention* “contains nothing to suggest its inapplicability in cases of mass influx.”¹⁵⁷ Nor is article I(2) of the *1969 Convention* the only refugee definition that permits prima facie refugee status determination (RSD): if the objective circumstances that triggered the application of the presumption of eligibility for refugee status “are those under Article IA(2) of the 1951 Refugee Convention ... then the persons recognised to be *prima facie* refugees are refugees within the meaning of”¹⁵⁸ that article. Indeed, refugees fleeing Hungary for Austria and Yugoslavia following the 1956 Soviet invasion and occupation were recognized on a prima facie basis under the *1951 Convention*.¹⁵⁹ The determination of refugee status on a prima facie basis in situations of mass influx is not a product of the *1969 Convention*, nor is it inherently or exclusively linked to that instrument. Rather, it arose as a matter of practical necessity in situations of mass influx,¹⁶⁰ in which “the numbers of the asylum seekers involved and the urgency to provide assistance ... make it impracticable and forbiddingly costly to administer individual status determination.”¹⁶¹

The false attribution of the group determination of refugee status to the *1969 Convention* has caused confusion between the latter concept and the prima facie recognition of refugee status in situations of mass influx.¹⁶² Prima facie RSD is a process whereby individual refugee status is recognized on the basis of a presumption.¹⁶³ That such a presumption is

¹⁵⁵ *1969 Convention*, *supra* note 2, art I(1).

¹⁵⁶ *Ibid.*, art I(2).

¹⁵⁷ *Supra* note 100 at 9.

¹⁵⁸ Rutinwa, “Prima Facie Status”, *supra* note 66 at 5.

¹⁵⁹ See Sara E Davies, “Redundant or Essential? How Politics Shaped the Outcome of the 1967 Protocol” (2007) 19:4 *Int'l J Refugee L* 703 at 713.

¹⁶⁰ See Matthew Albert, “Governance and *Prima Facie* Refugee Status Determination: Clarifying the Boundaries of Temporary Protection, Group Determination, and Mass Influx” (2010) 29:1 *Refugee Survey Quarterly* 61 at 66-68.

¹⁶¹ Rutinwa, “Prima Facie Status”, *supra* note 66 at 2.

¹⁶² See Okoth-Obbo, *supra* note 4 at 118.

¹⁶³ This understanding of prima facie RSD was first articulated by Jackson (*supra* note 91 at 4) and has been supported by Albert (although Albert uses the language of “inference”) (*supra* note 160 at 65), Durieux and Hurwitz (*supra* note 64 at 120), Durieux and McAdam (*supra* note 100 at 12), and Rutinwa (“Prima Facie Status”, *supra* note 66 at 6). It is not incompatible with the more subjective approach to RSD under article I(2) of the *1969 Convention* discussed above; a prima facie approach would simply presume the existence of a nexus between the 1969 Event and flight and recognize an individual’s refugee status on that basis.

often applied to groups in situations of mass influx is the source of the erroneous conflation of *prima facie* RSD with the group determination of refugee status. In fact, there is no such thing as group RSD; it is just an imprecise way of expressing the need to resort to *prima facie* status determination in situations of large-scale influx. Under a *prima facie* process of status determination, “it is not the refugee quality ... of the entire group that is determined, but that of each individual in the group. Groups do not accrue refugee status, be it *prima facie* or by other means. Only individuals do.”¹⁶⁴ Albert puts it similarly when he maintains that *prima facie* RSD is “better described as being an expedited form of individual RSD, not ‘group’ RSD.”¹⁶⁵ This view is confirmed by UNHCR’s handbook, which explains:

[S]ituations have ... arisen in which entire groups have been displaced under circumstances indicating that members of the group could be considered individually as refugees. ... Recourse has therefore been had to so-called “group determination” of refugee status, whereby each member of the group is regarded *prima facie* (i.e. in the absence of evidence to the contrary) as a refugee.¹⁶⁶

Thus the ascription of group RSD to the *1969 Convention* has not only perpetuated a misconception about the convention, it has also contributed to the propagation of a legal concept with no actual basis in law, or at the very least, to the proliferation of inaccurate legal terminology.

A related misconception has to do with the nature of the refugee status that recognition on a *prima facie* basis confers. There is a view that such recognition creates only a “presumption of refugeehood and therefore entails an incomplete (or secondary) refugee status,”¹⁶⁷ in terms of both its durability and the post-recognition rights that attach. Okoth-Obbo evidences this view when he notes, “The *prima facie* concept refers to the *provisional* consideration of a person or persons as refugees without the requirement to complete refugee status determination formalities to establish definitively the qualification or not of each individual.”¹⁶⁸ This implies that refugees recognized on a *prima facie* basis receive only temporary protection¹⁶⁹ and do not qualify for the full range of rights conferred by individual recognition. Indeed, according to the Lawyers Committee for Human Rights, “the notion of group eligibility under the OAU Convention

¹⁶⁴ Durieux & Hurwitz, *supra* note 64 at 118.

¹⁶⁵ *Supra* note 160 at 83.

¹⁶⁶ *Handbook on Refugee Status*, *supra* note 116 at para 44 [underlining added, italics in original].

¹⁶⁷ Durieux & McAdam, *supra* note 100 at 12.

¹⁶⁸ *Supra* note 4 at 119.

¹⁶⁹ Rutinwa, “*Prima Facie Status*”, *supra* note 66 at 15.

was based on the premise of legally institutionalized temporary protection.”¹⁷⁰

Durieux and Hurwitz,¹⁷¹ Durieux and McAdam,¹⁷² Jackson,¹⁷³ and Rutinwa¹⁷⁴ have each, however, rejected this view of *prima facie* refugee status as temporary and incomplete, on the basis of the conclusiveness of the *prima facie* presumption of refugeehood. While each author accepts that *prima facie* refugee status is indeed presumptive, the “operation of the presumption provides full and sufficient evidence”¹⁷⁵ of refugee status, unless “the State decides to subject it to scrutiny on an individual basis, and finds against the individual asylum seeker.”¹⁷⁶ That the presumption of refugee status within a process of *prima facie* RSD is conclusive suggests that refugees recognized pursuant to such a process are refugees like any other. Indeed, Rutinwa argues:

If persons recognised as refugees on a *prima facie* basis are presumed to be refugees within the definitions found under the relevant instruments, it logically follows that their treatment should be in accordance with the standards stipulated under those instruments.¹⁷⁷

Once one understands what *prima facie* RSD is and how it works, it becomes clear that it is merely a procedural tool that can have no effect on the substantive rights conferred. Indeed, Durieux and McAdam maintain, “One must conclude that *prima facie* recognition entails full refugee status, and beneficiaries of it are entitled, in Contracting States, to the standards of treatment stipulated by the 1951 Convention.”¹⁷⁸ While this resolves the question of the nature of the status that attaches to refugees recognized on a *prima facie* basis, it raises the related, wider issue of the nature of refugee status that results from recognition—whether on a *prima facie* basis or individually—under article I(2) of the *1969 Convention*. This critical issue is addressed in the part that follows.

III. Omissions

Refugees within the meaning of article I(1) of the *1969 Convention* are clearly also refugees under article 1A(2) of the *1951 Convention*—the two

¹⁷⁰ *Supra* note 147 at 30.

¹⁷¹ *Supra* note 64 at 120.

¹⁷² *Supra* note 100 at 12.

¹⁷³ *Supra* note 91 at 4.

¹⁷⁴ “Prima Facie Status”, *supra* note 66.

¹⁷⁵ Durieux & Hurwitz, *supra* note 64 at 120.

¹⁷⁶ Durieux & McAdam, *supra* note 100 at 12.

¹⁷⁷ Rutinwa, “Prima Facie Status”, *supra* note 66 at 14.

¹⁷⁸ *Supra* note 100 at 12.

definitions are almost identical—and therefore benefit from the standards of treatment guaranteed among articles 3-34 of the latter instrument in states that have ratified it. The *1969 Convention*, however, enumerates no such standards of treatment, nor does it explicitly incorporate the *1951 Convention's* rights framework. This fact is surprisingly overlooked by almost all of the limited number of critical analyses of the *1969 Convention*.¹⁷⁹ The lack of comprehensive standards of treatment in the *1969 Convention* raises the question of the specific refugee rights framework applicable—in addition to the one provided by human rights law more generally—to refugees who are recognized under article I(2) of the *1969 Convention*, but who do not meet the *1969 Convention* article I(1) or *1951 Convention* article 1A(2) criteria or who, for practical reasons, are not recognized under them.

The analysis above, demonstrating that the *1969 Convention's* unique refugee definition is not as broad as is often posited,¹⁸⁰ suggests that, in most cases, a refugee recognized under article I(2) will also meet the *1969 Convention* article I(1) or *1951 Convention* article 1A(2) definition. However, there will remain a very limited number of individuals who meet the *1969 Convention's* unique definition but not the more traditional *1951 Convention* definition. Such individuals would include, for example, those fleeing the limited neo-colonial situations that Okoth-Obbo points out continue to occur in Africa,¹⁸¹ or those who, for evidentiary reasons, do not qualify under the *1951 Convention* but whose country of origin is clearly in the grip of events seriously disturbing public order. Moreover, as explained above, in the situations of mass influx that so often characterize refugee movements in Africa, for reasons of expediency, UNHCR and states will often conduct RSD on a prima facie basis under article I(2) of the *1969 Convention*.¹⁸² That is not to say that individuals recognized on a prima facie basis would not also qualify for refugee status under the *1951 Convention*, but it does imply that the resources required to conduct such an assessment were not, in the circumstances, available. The practical effect of the absence of status determination under the *1951 Convention* is that the rights and benefits that flow from that instrument will not automatically inhere. This is why resettlement countries usually reassess the refugee status of article I(2) refugees before accepting them into their resettlement programmes, which under domestic law, usually depend on the resettlement candidate having met the international refugee defini-

¹⁷⁹ An exception is J Oloka-Onyango, "The Plight of the Larger Half: Human Rights, Gender Violence and the Legal Status of Refugee and Internally Displaced Women in Africa" (1996) 24:2-3 *Denv J Int'l L & Pol'y* 349.

¹⁸⁰ See Part II.

¹⁸¹ See Part II.A.

¹⁸² See Part II.C.

tion.¹⁸³ Host states will clearly not re-evaluate refugee status for the purposes of determining the post-recognition rights to which a refugee is entitled. For this reason, it is critical to determine the rights applicable to refugees *recognized* only under article I(2).

Remarkably little analysis has been devoted to this issue, perhaps because it seems obvious to many that, in states that are party to both the *1951* and *1969 Conventions*,¹⁸⁴ all refugees—regardless of the definition applicable—benefit from the *1951 Convention*'s rights framework. Indeed, the scholars who have expressed this view have done so rather matter-of-factly or with very little legal analysis.¹⁸⁵ Among them, Fitzpatrick notes only that the extension of the refugee definition under the *1969 Convention* was done “without any suggestion that the quality or durability of ... protection should be diminished as compared to that enjoyed by persons meeting the definition in the *1951 Convention*.”¹⁸⁶ In discussing the domestic refugee laws of South Africa and Tanzania, Mandal mentions that the states' obligations under the *1969 Convention* required them to guarantee the same rights to article I(2) refugees as to *1951 Convention* refugees.¹⁸⁷ McAdam maintains simply that the *1969 Convention*, “as a regional complement to the [1951] Convention, applies [1951] Convention rights to persons fleeing external aggression, occupation, foreign domination or events seriously disturbing public order.”¹⁸⁸ Van Hövell tot Westerflier argues, “[T]he majority of Africa's refugees, though not falling within the stricter scope of the *1951 Convention*, is, at least in theory, entitled to claim the rights set forth in this Convention.”¹⁸⁹ Weis maintains, “The *1951 Convention*, the *1967 Protocol* and the *African Convention*, *together*, constitute a codification of the rights—and duties—of refugees in Africa.”¹⁹⁰ Rutinwa is of the same opinion as Fitzpatrick, Mandal, McAdam,

¹⁸³ See generally Kristin Bergtora Sandvik, “A Legal History: The Emergence of the African Resettlement Candidate in International Refugee Management” (2010) 22:1 *Int'l J Refugee L* 20.

¹⁸⁴ Cape Verde, Comoros, Libya, and Mauritius are party to the *1969 Convention* but have neither signed nor ratified the *1951 Convention*.

¹⁸⁵ Admittedly none of the scholars discussed were explicitly addressing the question of the rights to which refugees recognized only under article I(2) of the *1969 Convention* are entitled. Rather, in each case, the issue arose as incidental to another question. What is truly remarkable is that none of the explicit analyses of the *1969 Convention* cited herein has examined this issue, which represents further evidence of the proposition advanced above about the dearth of critical analysis of the *1969 Convention*.

¹⁸⁶ *Supra* note 65 at 293.

¹⁸⁷ Mandal, *supra* note 40 at xi-xii.

¹⁸⁸ Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford: Oxford University Press, 2007) at 38 [McAdam, *Complementary Protection*].

¹⁸⁹ *Supra* note 111 at 174.

¹⁹⁰ “The Convention”, *supra* note 3 at 463 [emphasis added].

van Hövell tot Westerflie, and Weis, and provides some historical support for his perspective:

That refugees recognised under section I(2) of the OAU Convention are entitled to the same standards of treatment as those recognised under the 1951 Refugee Convention was confirmed by the Arusha Conference which recognised the definitions of the term 'refugee' contained in Article I, paragraphs 1 and 2 of the 1969 OAU Refugee Convention as the basis for determining refugee status in Africa and stressed "the essential need for ensuring that African refugees are identified as such, so as to enable them to invoke the rights established for their benefit in the 1951 Refugee Convention and the 1967 Refugee Protocol and the 1969 OAU Refugee Convention". This was irrespective of the procedure by which they were recognised.¹⁹¹

While Rutinwa marshals conference proceedings in support of his view, Durieux and Hurwitz rely on article VIII(2) of the *1969 Convention*, which describes the *1969 Convention* as the "regional complement" to the *1951 Convention*. They argue that

[o]n its face, the only possible interpretation of this provision is that a person recognized as a refugee under either branch of the definition in the complementary OAU Convention is entitled to the rights contained in the primary 1951 Convention.¹⁹²

This view is reiterated in Durieux's later article with McAdam,¹⁹³ and by McAdam herself.¹⁹⁴ Finally, Rwelamira explains that in states that have ratified both the universal and African refugee conventions:

The African refugee would then be able to enjoy the specific and well-defined rights relating to gainful employment, freedom of movement, welfare as well as rights relating to economic pursuit such as, labour legislation, acquisition of property, and other benefits related to employment.¹⁹⁵

Rwelamira concludes that "[i]n essence ... one should regard the two Conventions as cumulative."¹⁹⁶

However, just as the scholars mentioned above have taken the view that article I(2) refugees benefit from *1951 Convention* rights, others have adopted the opposite perspective, with a similar near absence of legal argument. Barutciski, describing the *1969 Convention* as a protection sys-

¹⁹¹ Rutinwa, "Prima Facie Status", *supra* note 66 at 14 [footnote omitted].

¹⁹² Durieux & Hurwitz, *supra* note 64 at 126.

¹⁹³ *Supra* note 100 at 11.

¹⁹⁴ *Complementary Protection*, *supra* note 188 at 213.

¹⁹⁵ "Some Reflections", *supra* note 32 at 171.

¹⁹⁶ *Ibid* at 173.

tem “meant to address mass flows”¹⁹⁷—an erroneous attribution that was discussed above—goes on to maintain that such systems “do not give refugees significant rights beyond *non-refoulement* guarantees.”¹⁹⁸ He further explains that, while the *1969 Convention*’s unique refugee definition

means that it is the sole international refugee treaty which applies to most African refugees, it does not include the elaborate socio-economic rights found in the 1951 Convention. ... Limited rights apparently encourage a more liberal admission policy in situations of mass inflow, while elaborate rights that may lead to integration tend to discourage Governments from allowing refugees to access their territories.¹⁹⁹

Barutciski is not alone in his perspective. Mendel maintains that

the 1951 Convention may be described as guaranteeing extensive benefits, tending towards residence rights, to a narrowly defined class of individuals. The OAU Convention, on the other hand, provides relatively limited benefits, broadly consistent with maintenance in camps, to those fleeing a wide range of situations.²⁰⁰

De la Hunt surely had views such as these in mind when she noted the emergence of an erroneous trend toward viewing the *1969 Convention* as proposing “an entirely different kind of refugee regime that [gives] fewer rights to more refugees.”²⁰¹ Chartrand had earlier anticipated the emergence of such a trend:

The broadening of the definition of the term refugee could ... raise problems if it leads to the emergence of different classes of refugees—those who qualify for refugee status under all the relevant international instruments and those who qualify under only one—with confusion and disagreement among states and international agencies as to whom to accord which standard of treatment.²⁰²

While the majority of scholars who have addressed this issue, however briefly, agree that article I(2) refugees benefit from *1951 Convention* rights in states party to that instrument, the existence of an opposite minority point of view and the sparse legal reasoning on both sides of the divide suggest that the issue deserves sustained attention. Three principal arguments are advanced in support of the view that article I(2) refugees

¹⁹⁷ *Supra* note 84 at 714.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid* [footnotes omitted].

²⁰⁰ Toby D Mendel, “Refugee Law and Practice in Tanzania” (1997) 9:1 Int’l J Refugee L 35 at 57.

²⁰¹ Lee Anne de la Hunt, “Refugee Law in South Africa: Making the Road of the Refugee Longer” (2002) [unpublished], cited in Rankin, *supra* note 4 at 417.

²⁰² Philip E Chartrand, “The Organization of African Unity and African Refugees: A Progress Report” (1975) 137:4 World Affairs 265 at 272.

in host states party to both the *1951* and *1969 Conventions* are entitled to the full range of rights guaranteed by the former instrument: a *lex specialis* argument, an equality argument, and finally, a treaty interpretation argument that is supported by certain general principles of international law. Each of these arguments is addressed in turn below; they are in addition to the obvious point that viewing article I(2) refugees as not entitled to *1951 Convention* rights empties article II of the *1969 Convention* of all but the most base content.

Before proceeding, however, it is necessary to examine *Conclusion No. 22* of the Executive Committee of the High Commissioner's Programme (ExCom) on the "Protection of Asylum-Seekers in Situations of Large-Scale Influx,"²⁰³ which may, at first blush, appear to support the perspective of Barutciski and Mendel. It could equally appear to support the false proposition discussed above, namely that refugees recognized on a prima facie basis (in situations of mass influx) enjoy fewer rights than their counterparts recognized via individual status determination. The ExCom conclusion begins by noting that large-scale influxes may include refugees within the meaning of the *1951 Convention*—persons "who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of their country of origin or nationality are compelled to seek refuge outside that country."²⁰⁴ It then goes on to enumerate sixteen standards of treatment for "asylum-seekers who have been temporarily admitted to a country pending arrangements for a durable solution."²⁰⁵ The list does not include certain rights guaranteed by the *1951 Convention*, such as rights to education,²⁰⁶ to gainful employment,²⁰⁷ to social security,²⁰⁸ and to identity papers²⁰⁹ or a travel document.²¹⁰

The protection regime established by *ExCom Conclusion No. 22* applies only, however, to large-scale influxes in which "[s]tates, although committed to obtaining durable solutions, have only found it possible to admit asylum-seekers without undertaking at the time of admission to

²⁰³ *Conclusion No. 22(XXXII) Protection of Asylum-Seekers in Situations of Large-Scale Influx*, reprinted in *Report of the Executive Committee for the Programme of the United Nations High Commissioner for Refugees on the Work of its Thirty-Second Session*, UNGAOR, 36th Sess, Supp No 12A, UN Doc A/36/12/Add.1, (1981), IV(2) [*ExCom Conclusion No. 22*].

²⁰⁴ *Ibid.*, IV(2)(I)(1).

²⁰⁵ *Ibid.*, IV(2)(II)(B).

²⁰⁶ *1951 Convention*, *supra* note 10, art 22.

²⁰⁷ *Ibid.*, art 17.

²⁰⁸ *Ibid.*, art 24.

²⁰⁹ *Ibid.*, art 27.

²¹⁰ *Ibid.*, art 28.

provide permanent settlement.”²¹¹ In other words, the conclusion applies only to situations of temporary protection—not the circumstance at issue here—and even in such situations, according to Goodwin-Gill, the conclusion provides “a point of departure only.” In certain circumstances, “even a ‘temporary’ solution may require more substantial provision for refugees, including the opportunity to earn a living and to have access to education, housing, and social assistance.”²¹² This view was affirmed during UNHCR’s Global Consultations on International Protection, during which it was noted that *ExCom Conclusion No. 22* “was never intended as a substitute for standards of protection under the 1951 Convention.”²¹³ Moreover, McAdam explains that the protection regime established by the ExCom conclusion must be understood within the particular context in which it was adopted, namely the mass exodus from Indochina beginning in the mid-1970s, when numbers overwhelmed individual processing and front-line states were not parties to the *1951 Convention*.²¹⁴ The conclusion, therefore, “filled a gap by identifying existing normative standards for States not bound by the [1951] Convention or [1967] Protocol.”²¹⁵ In considering the very particular circumstances to which it applies, it becomes clear that *ExCom Conclusion No. 22* provides no support for the proposition that article I(2) refugees enjoy fewer rights than those recognized pursuant to article I(1) of the *1969 Convention* or under the *1951 Convention*. Nor does it support the idea that refugees recognized on a prima facie basis enjoy more circumscribed rights than those recognized individually.

A. *The 1951 Convention as Lex Specialis*

“Complementary protection” describes the protection from *refoulement* “granted by States on the basis of an international protection need outside the 1951 Convention framework.”²¹⁶ The source of the prohibitions against *refoulement* subsumed within the concept of complementary protection generally arise directly from, or have been read into, international and regional human rights instruments, such as the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

²¹¹ *ExCom Conclusion No. 22*, *supra* note 203, IV(2)(I)(2).

²¹² Guy S Goodwin-Gill, “*Non-refoulement* and the New Asylum Seekers” (1986) 26:4 Va J Int’l L 897 at 906.

²¹³ UNHCR, Global Consultations on International Protection, *Protection of Refugees in Mass Influx Situations: Overall Protection Framework*, 1st Meeting, UN Doc EC/GC/01/4, (19 February 2001) at para 8.

²¹⁴ McAdam, *Complementary Protection*, *supra* note 188 at 246-47.

²¹⁵ *Ibid* at 247.

²¹⁶ *Ibid* at 21.

(CAT) and the *European Convention on Human Rights*.²¹⁷ In her groundbreaking study of complementary protection, McAdam argues that the *1951 Convention* “functions as a form of *lex specialis* (specialist law) for all those in need of international protection, and provides an appropriate legal status irrespective of the source of the State’s protection obligation.”²¹⁸ In other words, McAdam’s view is that the content of complementarily protected status derives from the rights framework contained in the *1951 Convention*, regardless of the fact that the beneficiaries of such status are not refugees within the meaning of its article 1A(2). McAdam advances several propositions in support of this thesis, but the core of her argument is that the *1951 Convention’s*

application has been extended through the expansion of *non-refoulement* under human rights law ... rather than by the conventional means of a Protocol. ... Since the scope of *non-refoulement* has been broadened by subsequent human rights instruments, this necessarily widens the Convention’s application.²¹⁹

If the *1951 Convention* provides the rights blueprint for all beneficiaries of complementary protection, then such rights must apply equally to refugees within the meaning of article I(2) of the *1969 Convention*. McAdam argues that the progressive development of human rights-based *non-refoulement*, in extending the range of individuals entitled to international protection, also extended the applicability of the *1951 Convention*. Surely the *1969 Convention’s* extension of protection from *refoulement* to individuals fleeing a 1969 Event extends the *1951 Convention’s* applicability in a similar fashion, especially because, as refugees, individuals recognized under article I(2) of the *1969 Convention* are in a situation even more conceptually similar to *1951 Convention* refugees than beneficiaries of complementary protection. This argument is of even more force when one considers McAdam’s reasoning regarding why human rights instruments do not themselves provide status in addition to protection from *refoulement*. She argues that it would be “futile for instruments like the CAT to enumerate the legal status arising from the application of *non-*

²¹⁷ *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221, Eur TS 5.

²¹⁸ *Complementary Protection*, *supra* note 188 at 1. However, the *1951 Convention* cannot be said to provide beneficiaries of complementary protection with status as such, because the status accorded by the *1951 Convention* is refugee status, for which beneficiaries of complementary protection by definition do not qualify. McAdam’s argument would have been more convincing had she argued that the *1951 Convention* articulates the *content* of complementary protected status, rather than any status as such. Furthermore, her designation of the *1951 Convention’s* rights framework as the *lex specialis* for all persons in need of international protection is problematic, because it may be taken to suggest that refugees are not also entitled to rights deriving from human rights law.

²¹⁹ *Ibid* at 209.

refoulement, since the Refugee Convention (as the *lex specialis*) already provides an appropriate status for any person protected by that principle.”²²⁰ By analogy, it would be similarly futile for the *1969 Convention* to enumerate an exhaustive list of refugee rights, since the *1951 Convention*, as the *lex specialis* on the content of refugee status, already does so.

The argument that beneficiaries of complementary protection, and hence article I(2) refugees, enjoy *1951 Convention* rights by virtue of that convention’s function as the *lex specialis* for individuals in need of international protection must, however, be approached with some caution in light of Hathaway’s critique of McAdam’s work.²²¹ Hathaway rejects McAdam’s thesis on two main grounds. First, he argues that “there is no basis to suggest that the Refugee Convention exists to delineate the entitlements of persons granted protection against *refoulement*.”²²² Second, he maintains that McAdam’s contention is premised on an incorrect application of the concept of *lex specialis*. The notion of *lex specialis* is used primarily to resolve conflicts between competing norms of international law but can also be employed “to assist in the construction of a general provision in relation to a matter also governed by a more specific norm.”²²³ McAdam employs *lex specialis* in quite a different sense: to extend the *1951 Convention*’s “beneficiary class to embrace persons outside its textual ambit.”²²⁴ According to Hathaway, “Because there is simply a legal void to be filled in relation to non-refugees, there is no conflict of rules that *lex specialis* can assist to resolve.”²²⁵ Hathaway further argues that the secondary usage of *lex specialis* similarly provides no support for McAdam’s position:

[T]he importance of interpreting general rules in harmony with more specific rules does not advance McAdam’s thesis that the absence of rules defining the status of the broader class of non-returnable persons must be filled by effectively recasting the Refugee Convention’s beneficiary class.²²⁶

If, as Hathaway contends, the *1951 Convention* is *not* the *lex specialis* for all individuals in need of international protection, then it clearly becomes impossible to argue that *1951 Convention* rights apply to article

²²⁰ *Ibid* at 209-10.

²²¹ Hathaway, “Leveraging Asylum”, *supra* note 56. For McAdam’s response to Hathaway’s critique, see Jane McAdam, “Status Anxiety: Complementary Protection and the Rights of Non-convention Refugees” online: (2010) University of New South Wales Faculty of Law Research Series 1 <<http://law.bepress.com/unswwps/flrps10/art1/>>.

²²² Hathaway, “Leveraging Asylum”, *supra* note 56 at 531.

²²³ *Ibid* at 533.

²²⁴ *Ibid* at 532.

²²⁵ *Ibid* at 533.

²²⁶ *Ibid* at 534.

I(2) refugees on that basis. In light of Hathaway's critique, it seems that McAdam's position is merely *lex ferenda*. Resolving the issue of whether article I(2) refugees can enjoy *1951 Convention* rights does not, however, depend on McAdam's view being *lex lata*. A range of other bases exists, detailed below, leading to the conclusion that article I(2) refugees do enjoy *1951 Convention* rights, one of which stems from a point on which Hathaway and McAdam agree. Both authors, and others,²²⁷ have found that the law of non-discrimination provides a basis for guaranteeing *1951 Convention* rights to beneficiaries of complementary protection.²²⁸ The thesis that the legal duty of non-discrimination mandates the equal treatment of refugees and beneficiaries of complementary protection was developed by Pobjoy,²²⁹ while Hathaway has explored the role of non-discrimination regarding equal treatment between citizens and non-citizens,²³⁰ and between and among *1951 Convention* refugees.²³¹ These approaches can equally be employed for the benefit of article I(2) refugees, as is demonstrated below.

B. Equality

The legal duty of non-discrimination requires that "irrelevant criteria not be taken into account in making allocations."²³² Article 26 of the *International Covenant on Civil and Political Rights* (ICCPR) articulates this duty with particular force because the ambit of its guarantee is not limited to the ICCPR alone;²³³ rather, it applies to the "allocation of all public goods, including rights not stipulated by the Covenant itself."²³⁴ Article 26 provides:

²²⁷ See e.g. Tom Clark, "Rights Based Refuge, the Potential of the 1951 Convention and the Need for Authoritative Interpretation" (2004) 16:4 Int'l J Refugee L 584; Tom Clark in cooperation with François Crépeau, "Mainstreaming Refugee Rights: The 1951 Refugee Convention and International Human Rights Law" (1999) 17:4 Nethl QHR 389.

²²⁸ Hathaway, "Leveraging Asylum", *supra* note 56 at 529; McAdam, *Complementary Protection*, *supra* note 188 at 220-23.

²²⁹ Jason Pobjoy, "Treating Like Alike: The Principle of Non-discrimination as a Tool to Mandate the Equal Treatment of Refugees and Beneficiaries of Complementary Protection" (2010) 34:1 Melbourne UL Rev 181.

²³⁰ James C Hathaway, *The Rights of Refugees Under International Law* (Cambridge, UK: Cambridge University Press, 2005) at 123-47 [Hathaway, *Rights of Refugees*].

²³¹ *Ibid* at 238-60.

²³² *Ibid* at 124.

²³³ See Human Rights Committee, *General Comment No. 18: Non-discrimination*, 37th Sess, UN Doc HRI/GEN/1/Rev.9 (Vol. I), (1989), reprinted in *Report of the Human Rights Committee*, UNGAOR, 45th Sess, Supp No 40, UN Doc A/45/40, vol I, (1990) annex VI(A), 173 at para 12 [*General Comment No. 18*].

²³⁴ Hathaway, *Rights of Refugees*, *supra* note 230 at 125.

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

This guarantee ensures both formal equality (“equality before the law”), as well as substantive equality (“equal protection of the law”). It does not, however, “establish an unconditional guarantee of equality.”²³⁵ Indeed, not every instance of differential treatment amounts to discrimination; in many circumstances, it is perfectly reasonable for a state to differentiate between groups. Rather, equality requires that any unequal treatment be “properly justified, according to consistently applied, persuasive, and acceptable criteria.”²³⁶ Accordingly, the Human Rights Committee (HRC), which is the ICCPR’s treaty-monitoring body, has read the following proviso into article 26:

[T]he Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.²³⁷

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

Pobjoy has distilled article 26 and its proviso into a convenient three-pronged test for establishing unlawful discrimination:

- 1 Has there been differential treatment between individuals in similar circumstances? In other words, is there an inequality *basis* for a discrimination claim?
- 2 Is the unequal treatment based on a ground captured by art 26?
- 3 Is the unequal treatment based on “reasonable and objective” criteria?²³⁸

This test, with the “pursuit of a legitimate aim” appended to its third prong,²³⁹ will be applied to determine whether article 26 prohibits the differential allocation of rights as between refugees recognized pursuant to article 1A(2) of the *1951 Convention* or article I(1) of the *1969 Convention*,

²³⁵ Pobjoy, *supra* note 229 at 207.

²³⁶ Hathaway, *Rights of Refugees*, *supra* note 230 at 124, citing Christopher McCrudden, “Equality and Non-discrimination” in David Feldman, ed, *English Public Law* (Oxford: Oxford University Press, 2004) 581 at 614.

²³⁷ *General Comment No. 18*, *supra* note 233 at para 13.

²³⁸ *Supra* note 229 at 209.

²³⁹ This element is inexplicably missing from the third prong of Pobjoy’s test.

and refugees recognized under article I(2) of the latter instrument.²⁴⁰ As a preliminary matter, however, it must be established that an article I(2) refugee can invoke the ICCPR vis-à-vis his or her host state, assuming that state has ratified the ICCPR and its optional protocol permitting individual communications.²⁴¹ The HRC has confirmed that as a general rule, the rights enshrined in the ICCPR “must be guaranteed without discrimination between citizens and aliens.”²⁴² All refugees, therefore, benefit from the protections afforded by the ICCPR.

As a starting point, assume that state X—which is party to the *1951 Convention*, the *1969 Convention*, and the ICCPR and its optional protocol—guarantees the full range of *1951 Convention* rights to refugees under that instrument and under article I(1) of the *1969 Convention*, but guarantees refugees recognized under article I(2) of the *1969 Convention* only the few rights contained therein (*non-refoulement*²⁴³ and the right to a travel document²⁴⁴). The first prong of Pobjoy’s test, which must establish that similarly situated individuals have been treated differently, is clearly answered in the affirmative. Once arrived in state X, a refugee who fled individualized persecution is no different from one who fled a 1969 Event. The two, as refugees, are in similar circumstances, yet they do not enjoy the same allocation of rights.

To establish discrimination, the test’s second prong must demonstrate that the unequal treatment is based on a ground captured by article 26. The unequal treatment by state X is based on the source of the individual’s refugee status. This is not one of the grounds enumerated in article 26; however, the listing there is not exhaustive. The source of the unequal treatment may fall within “any other status”. The HRC has approached the meaning of “any other status” on a case-by-case basis. The only general requirement is that the status in question must capture a distinct group, as opposed to an individual.²⁴⁵ Refugees recognized under article

²⁴⁰ And, if one accepts McAdam’s thesis that beneficiaries of complementary protection enjoy *1951 Convention* rights, then as between them and refugees recognized under article I(2) of the *1969 Convention*.

²⁴¹ *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976).

²⁴² Human Rights Committee, *General Comment No. 15: The Position of Aliens Under the Covenant*, 27th Sess, UN Doc HRI/GEN/1/Rev.9 (Vol. 1), (1986), reprinted in *Report of the Human Rights Committee*, UNGAOR, 41st Sess, Supp No 40, UN Doc A/41/40 (1986) annex VI, 117 at para 2.

²⁴³ *1969 Convention*, *supra* note 2, art II(3).

²⁴⁴ *Ibid.*, art VI(1).

²⁴⁵ *Communication No. 218/1986, Hendrika S. Vos v. The Netherlands*, 35th Sess, UN Doc CCPR/C/35/D/218/1986, (1986), reprinted in *Report of the Human Rights Committee*, UNGAOR, 44th Sess, Supp No 40, UN Doc A/44/40, (1989) annex X.G, 232.

I(2) of the *1969 Convention* are clearly a distinct group. Moreover, according to Pobjoy, because the HRC has repeatedly affirmed that distinctions based upon nationality or citizenship fall within the notion of “other status” in article 26, it “seems reasonable to assume that this principle would apply between different categories of non-citizens.”²⁴⁶ The second prong of the test is therefore also answered affirmatively.

Under the test’s third prong, to avoid running afoul of the ICCPR, the unequal allocation of rights must be based on reasonable and objective criteria and must be in pursuit of a legitimate aim. Owing to the paucity of jurisprudence on the issue, “[t]he extent to which the Committee is likely to consider differential treatment between categories of non-citizens to be reasonable and objective is unclear.”²⁴⁷ In the absence of case law, Pobjoy finds that the most sensible approach is to

identify the potential bases which a state may invoke to justify the differential allocation of rights ... and ... critically examine these bases to pre-empt the likelihood that they will be considered reasonable and objective criteria justifying the differential allocation of rights.²⁴⁸

The only conceivable basis on which state X might decide to circumscribe the rights of article I(2) refugees would be the belief that their plight is inherently more temporary than refugees fleeing individualized persecution. Such logic has been employed to justify the lower standards of treatment accorded to beneficiaries of complementary (subsidiary) protection under the European Union’s *Qualification Directive*.²⁴⁹ This belief is not, however, borne out in practice. An ample number of studies have documented the increasingly protracted nature of refugee situations in Africa²⁵⁰ and the persistence of the conflicts giving rise to them.²⁵¹ Moreover, to accord fewer rights to refugees fleeing a 1969 Event based on the theory that their plight is inherently temporary misconceives the nature of the universal regime of refugee protection, which itself is premised on temporariness. Because the denial of *1951 Convention* rights to article I(2) refugees cannot be based on criteria that are objective and reasonable,

²⁴⁶ Pobjoy, *supra* note 229 at 214.

²⁴⁷ *Ibid* at 215.

²⁴⁸ *Ibid* at 217.

²⁴⁹ See *ibid* at 220.

²⁵⁰ See e.g. Edwin Odhiambo Abuya, “From Here to Where? Refugees Living in Protracted Situations in Africa” in Alice Edwards & Carla Ferstman, eds, *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge, UK: Cambridge University Press, 2010) 125; Crisp, *supra* note 1; Verdirame & Harrell-Bond, *supra* note 1.

²⁵¹ See e.g. Gérard Prunier, *From Genocide to Continental War: The ‘Congolese’ Conflict and the Crisis of Contemporary Africa* (London, UK: Hurst, 2009).

there is no need to proceed to the test's second sub-prong regarding legitimate aims. Thus the test's third prong is answered in the negative.

The application of Pobjoy's test suggests that distinguishing between the allocation of rights to article I(2) refugees and refugees recognized under article 1A(2) of the *1951 Convention* or article I(1) of the *1969 Convention* constitutes unlawful discrimination under the ICCPR. UNHCR takes a similar position in more general terms, finding it "doubtful that international law would permit selective provision of international protection according to category."²⁵² Indeed, even the *1969 Convention* itself recalls "that the Charter of the United Nations and the Universal Declaration of Human Rights have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination."²⁵³ There is arguably, therefore, a duty to guarantee *1951 Convention* rights to all article I(2) refugees in African states party to the ICCPR and both refugee conventions. This conclusion is, however, tentative, as the HRC has never ruled on the issue and "there is very limited jurisprudence concerning the differential allocation of rights to categories of non-citizens generally."²⁵⁴ Indeed, it is unlikely that the issue of discrimination against article I(2) refugees will ever come before the HRC, since states in Africa do not, in practice, distinguish between refugees recognized either under article 1A(2) of the *1951 Convention* or under article I(1) of the *1969 Convention*, and those recognized only under article I(2) of the *1969 Convention*. Nor does domestic refugee legislation in Africa generally make such a formal distinction. These facts are considered in the discussion of state practice in the part that follows.

C. *The Law of Treaties and General International Law*

That the *1969 Convention* is a regional instrument complementing the *1951 Convention* is "a novelty in itself."²⁵⁵ Notwithstanding the *sui generis* nature of the relationship between the *1951* and *1969 Conventions*, several principles emanating from the law of treaties, which were codified with the 1969 adoption of the *Vienna Convention on the Law of Treaties (Vienna Convention)*, are instructive in determining the rights to which refugees recognized only under article I(2) of the *1969 Convention* are entitled. These are the rule on the application of successive treaties relating to the

²⁵² UNHCR, "Towards a Common European Asylum System" in Constança Dias Urbano de Sousa & Philippe de Bruycker, eds, *The Emergence of a European Asylum Policy* (Brussels: Bruylant, 2004) 227 at 248-49, cited in McAdam, *Complementary Protection*, *supra* note 188 at 221.

²⁵³ *1969 Convention*, *supra* note 2, Preamble, para 6.

²⁵⁴ Pobjoy, *supra* note 229 at 209.

²⁵⁵ Nyanduga, *supra* note 107 at 93.

same subject matter,²⁵⁶ the general rule of interpretation,²⁵⁷ and the rule on supplementary means of interpretation.²⁵⁸ Certain general principles of international law are also relevant. Each is addressed in turn below.

1. Successive Treaties Relating to the Same Subject Matter

Article 30 of the *Vienna Convention* addresses the question of the relationship between successive treaties relating to the same subject matter. This provision, while primarily invoked to resolve explicit conflicts, extends its scope by addressing “more generally *the rights and obligations of States part[y] to successive treaties relating to the same subject-matter.*”²⁵⁹ However, doctrinal agreement on the strict construction²⁶⁰ to be applied to “relating to the same subject-matter”²⁶¹—language that appears in the subparagraph addressing the general applicability of article 30—and to the residuary character of article 30 in relation to conflict clauses²⁶² raises the threshold question of whether article 30 even applies to the issue at hand.

The *1969 Convention* seeks only to regulate matters not already covered by the *1951 Convention*,²⁶³ calling into question whether it and the *1951 Convention* can be construed as relating to the same subject matter.²⁶⁴ In this regard, the relationship between the *1951* and *1969 Conventions* is an example of the main basis on which Sinclair critiques article 30. He notes:

Article 30 of the Vienna Convention is in many respects not entirely satisfactory. The rules laid down fail to take account of the many complications which arise when there coexist two treaties relating to the same subject-matter, one negotiated at the regional level ... and

²⁵⁶ See *VCLT*, *supra* note 12, art 30.

²⁵⁷ See *ibid*, art 31.

²⁵⁸ See *ibid*, art 32.

²⁵⁹ Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden: Martinus Nijhoff, 2009) at 402.

²⁶⁰ See Anthony Aust, *Modern Treaty Law and Practice*, 2d ed (Cambridge, UK: Cambridge University Press, 2007) at 229; Sinclair, *supra* note 137 at 98.

²⁶¹ *VCLT*, *supra* note 12, art 30(1).

²⁶² Aust, *supra* note 260 at 227; Sinclair, *supra* note 137 at 97; Villiger, *supra* note 259 at 403.

²⁶³ See Rwelamira, “Some Reflections”, *supra* note 32 at 167.

²⁶⁴ See generally Christopher J Borgen, “Resolving Treaty Conflicts” (2005) 37:3 *Geo Wash Int’l L Rev* 573 at 603. *Contra* International Law Commission finalized by Martti Koskeniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (Report of the Study Group of the International Law Commission), 58th Sess, UN Doc A/CN.4/L.682, (2006) at para 22 [mimeo limited].

another negotiated within the framework of a universal organisation.²⁶⁵

Furthermore, article 30 is residual in the sense that it only applies “in the absence of express treaty provisions regulating priority.”²⁶⁶ That is to say that, where a treaty expressly provides how it should relate to another instrument, article 30 is not invoked. The *1969 Convention* indeed contains such conflict clauses.²⁶⁷

Yet article 30 may nevertheless be instructive in the instant case, because it confirms the primacy of the *1969 Convention*’s conflict clauses. Article 30(2) of the *VCLT* concerns conflict clauses aimed at giving priority to another treaty. It provides, “When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.” According to Villiger, “[O]n the contractual level, the residual character of Article 30 *vis-à-vis* the conflict clause of another treaty may be based on its own *para. 2*—but only when that conflict clause grants priority to other treaties.”²⁶⁸ The *1969 Convention*’s conflict clauses indeed acknowledge the primacy of the *1951 Convention*: the ninth preambular paragraph recognizes that the *1951 Convention* “constitutes the basic and universal instrument relating to the status of refugees,” and article VIII(2) states that the *1969 Convention* “shall be the effective regional complement in Africa” of the *1951 Convention*. Article 30(2) therefore mandates that these conflict provisions govern the resolution of the issue at hand.²⁶⁹ Their proper interpretation necessitates recourse to the general rule of interpretation.

2. The General Rule of Interpretation

The general rule of interpretation provides, “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”²⁷⁰ According to Sinclair, the ordering of elements within this provision is important: “The initial search is for the ‘ordinary meaning’ to be given to the terms of the treaty in their ‘context’; it is *in light of* the object and purpose of the treaty that the initial and preliminary conclusion

²⁶⁵ Sinclair, *supra* note 137 at 98.

²⁶⁶ *Ibid* at 97.

²⁶⁷ *1969 Convention*, *supra* note 2, Preamble, para 9, art VIII(2). According to Villiger, conflict clauses may appear “in the treaty itself, in its preamble, or in an annex” (*supra* note 259 at 404).

²⁶⁸ *Ibid* at 403.

²⁶⁹ The same result is reached through an application of the principle of *lex specialis*, which although not codified in article 30, continues to exist alongside it as customary law.

²⁷⁰ *VCLT*, *supra* note 12, art 31(1).

must be tested and either confirmed or modified.”²⁷¹ The clauses relevant to resolving the issue at hand are, as discussed above, the *1969 Convention*’s conflict clauses.²⁷² Also relevant is the *1969 Convention*’s tenth preambular paragraph, which calls

upon Member States of the Organization [of African Unity] who had not already done so to accede to the United Nations Convention of 1951 and to the Protocol of 1967 relating to the Status of Refugees, and meanwhile to apply their provisions to refugees in Africa.

In interpreting the relevant provisions in line with their ordinary meaning and in context, it becomes clear that article I(2) refugees are entitled to the rights contained in the *1951 Convention*. In recognizing the *1951 Convention* as “the basic and universal instrument relating to the status of refugees,”²⁷³ the *1969 Convention* establishes its predecessor instrument as the global reference point for refugee status in a general sense. In going on to recognize that the *1951 Convention* “reflects the deep concern of States for refugees and their desire to establish *common standards for their treatment*,”²⁷⁴ the *1969 Convention* specifically establishes the *1951 Convention* as the universal source of refugee rights. This is why, in the preambular paragraph that follows, the *1969 Convention* calls on states that have “not already done so to accede to the United Nations Convention of 1951 and to the Protocol of 1967,” and to meanwhile “apply their provisions to refugees in Africa.”²⁷⁵ Indeed, according to D’Sa:

[T]he fact that the OAU Convention expressly recognizes the legal status and validity of the UN Convention and encourages the OAU Member States to accede to the latter is ... evidence that the OAU Convention does not preclude the application by its Member States of the additional provisions of the UN Convention relating to such matters as gainful employment, welfare, housing, public education, administrative assistance and so on.²⁷⁶

The co-application of the *1951* and *1969 Conventions* that emerges from the latter instrument’s preamble is the meaning that must be similarly attributed to the final relevant provision: the conflict clause at article VIII(2). It, again, provides that the *1969 Convention* is the “effective regional complement in Africa” of the *1951 Convention*. As already mentioned, Durieux and Hurwitz find that “[o]n its face, the only possible interpretation of this provision is that a person recognized as a refugee un-

²⁷¹ *Supra* note 137 at 130.

²⁷² Which are at article VIII(2) and preambular paragraph 9.

²⁷³ *1969 Convention*, *supra* note 2, Preamble, para 9.

²⁷⁴ *Ibid* [emphasis added].

²⁷⁵ *Ibid*, Preamble, para 10.

²⁷⁶ D’Sa, *supra* note 61 at 390.

der either branch of the definition in the complementary OAU Convention is entitled to the rights contained in the primary 1951 Convention.”²⁷⁷ Durieux and McAdam,²⁷⁸ and McAdam²⁷⁹ reach the same conclusion, while Okoth-Obbo explains that, by describing itself as the regional complement to the *1951 Convention*, the full scope of application of the *1969 Convention* “must be considered as also including the 1951 Convention.”²⁸⁰ Similarly, Awuku views the language of article VIII(2) as implying that the *1969 Convention* does not supersede, but rather that it supplements, the *1951 Convention*.²⁸¹ Holborn considers article VIII(2), as well as preambular paragraphs 9 and 10, and finds that

[t]he final text of the 1969 OAU Refugee Convention makes clear that it was drawn up to supplement and not to supersede or conflict with the 1951 Convention and the 1967 Protocol. ... The substantive articles of the OAU Convention create obligations to be assumed by contracting states in addition to those they have accepted by becoming parties to the 1951 Convention and 1967 Protocol.²⁸²

These views suggest that the *1951* and *1969 Conventions* are co-extensive in Africa: an individual can be recognized as a refugee under article I(2) of the *1969 Convention*, and the rights associated with such status can then be derived from the *1951 Convention*.

This initial interpretation is not vitiated when considered in light of the *1969 Convention*’s object and purpose, which can be gleaned from the convention’s preamble. The preamble begins by “[n]oting with concern the constantly increasing numbers of refugees in Africa and [by stating that signatories are] desirous of finding ways and means of alleviating [refugees’] misery and suffering as well as providing them with a better life and future,”²⁸³ and goes on to articulate the “need for an essentially humanitarian approach towards solving the problems of refugees.”²⁸⁴ These preambular paragraphs suggest that a form of asylum featuring only the few rights explicitly recognized by the *1969 Convention*—*non-refoulement* and the right to a travel document—would be manifestly inconsistent with its object and purpose of alleviating the suffering of refugees in a

²⁷⁷ *Supra* note 64 at 126.

²⁷⁸ *Supra* note 100 at 11.

²⁷⁹ *Complementary Protection*, *supra* note 188 at 213.

²⁸⁰ *Supra* note 4 at 98.

²⁸¹ *Supra* note 36 at 81.

²⁸² Louise W Holborn with the assistance of Philip & Rita Chartrand, *Refugees: A Problem of our Time; The Work of the United Nations High Commissioner for Refugees, 1951-1972*, vol 1 (Metuchen, NJ: Scarecrow Press, 1975) at 188.

²⁸³ *1969 Convention*, *supra* note 2, Preamble, para 1.

²⁸⁴ *Ibid*, Preamble, para 2.

humanitarian manner. The preamble confirms the preliminary interpretation reached above: refugees recognized only under article I(2) of the *1969 Convention* benefit from the rights enumerated in the *1951 Convention*.

The general rule of interpretation includes an enumeration of the other elements that must be taken into account, together with the context. Among them are “[a]ny relevant rules of international law applicable in the relations between the parties”²⁸⁵ and “[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”²⁸⁶ The consideration of each of these elements affirms the conclusion reached above.

That the *Vienna Convention* mandates the consideration of relevant rules of international law reflects the principle of systemic integration, pursuant to which treaties, as incarnations of international law, are “limited in scope and ... predicated for their existence and operation on being part of the international law system. As such, they must be ‘applied and interpreted against the background of ... general principles of international law.’”²⁸⁷ Thus “[e]very treaty provision must be read not only in its own context, but in the wider context of general international law.”²⁸⁸ The international law that is relevant consists of those rules that touch “on the same subject matter as the treaty provision or provisions being interpreted or which in any way affect that interpretation”²⁸⁹ and that are in force at the time of interpretation.²⁹⁰ The *1951 Convention* and the *1967 Protocol*, the *Universal Declaration of Human Rights*, the ICCPR, and the *International Covenant on Economic, Social and Cultural Rights*²⁹¹ may

²⁸⁵ *VCLT*, *supra* note 12, art 31(3)(c).

²⁸⁶ *Ibid*, art 31(3)(b).

²⁸⁷ Campbell McLachlan, “The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention” (2005) 54:2 ICLQ 279 at 280 [footnotes omitted], citing Lord McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961) at 466.

²⁸⁸ Sinclair, *supra* note 137 at 139.

²⁸⁹ Richard K Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008) at 260.

²⁹⁰ See *ibid* at 251; Villiger, *supra* note 259 at 433. Sinclair provides a less absolute analysis of this issue, however he ultimately concludes that “[t]here is some evidence that the evolution and development of international law may exercise a decisive influence on the meaning to be given to expressions incorporated in a treaty, particularly if these expressions themselves denote relative or evolving notions such as ‘public policy’ or ‘the protection of morals’” (*supra* note 137 at 139).

²⁹¹ 16 December 1966, 993 UNTS 3, Can TS 1976 No 46 (entered into force 3 January 1976).

thus be relevant to the interpretation of the *1969 Convention*.²⁹² Their applicability is by no means, however, a foregone conclusion.

International refugee and human rights law cannot necessarily be applied to the interpretation of the *1969 Convention*, because the relevant rules of international law must be applicable in the relations between the parties. It is not clear whether this reference is to the parties to a dispute over the meaning of a particular treaty or to all the parties to the treaty being interpreted. Gardiner's view is that article 31(3)(c) likely refers to the latter.²⁹³ This raises the question of

whether the focus is on examination of relations between *all* the parties to the treaty, whether the situation is similar to that of subsequent practice (where the practice must be the concordant practice of a sufficient number of parties coupled with the acquiescence and imputed concurrence of the rest), or whether there is some other interpretation to be given.²⁹⁴

Ultimately, the jurisprudence and doctrine on this issue have not produced a clear answer.²⁹⁵ At the very least, it is arguable that the international human rights law prevailing at the time of interpretation of the *1969 Convention* is generally relevant to such interpretation, in particular because “[t]reaties that affect human rights cannot be applied in such a manner as to constitute a denial of human rights as understood at the time of their application.”²⁹⁶ Invoking international refugee and human rights law to determine whether article I(2) refugees benefit from *1951 Convention* rights reaffirms the conclusion reached above; finding otherwise would be nonsensical, as it would effectively deny article I(2) refugees the human rights from which they would otherwise benefit. Of particular note in applying human rights law to the interpretation of the *1969 Convention* is the preamble to the *1967 Protocol*, which provides that “*equal status* should be enjoyed by all refugees,” including those who were recognized as a result of “new refugee situations [that] have arisen since the [1951] Convention was adopted.”²⁹⁷ Applying this provision to an interpretation of the *1969 Convention* clearly suggests that the rights framework under the *1969 Convention* should be derived from the *1951 Convention*.

²⁹² See Clark, *supra* note 227 at 594; Hathaway, *Rights of Refugees*, *supra* note 230 at 64-67.

²⁹³ *Supra* note 229 at 269.

²⁹⁴ *Ibid.*

²⁹⁵ See *ibid.*

²⁹⁶ *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, [1997] ICJ Rep 7 at 114.

²⁹⁷ *1967 Protocol*, *supra* note 35, Preamble, paras 3-4 [emphasis added].

The subsequent state practice referred to by article 31(3)(b) includes domestic legislation.²⁹⁸ Among African states that have domesticated the *1951* and *1969 Conventions*, many have done so in such a way that affirms that *1951 Convention* rights apply to article I(2) refugees.²⁹⁹ Uganda's *Refugees Act, 2006*,³⁰⁰ for example, includes both the *1969 Convention* article I(1) and the *1951 Convention* refugee definition, as well as the one articulated at article I(2) of the *1969 Convention*, and guarantees both types of refugee a range of rights derived from the *1951 Convention*.³⁰¹ The same is true in South Africa³⁰² and Tanzania,³⁰³ among other states. It must be noted, however, that commentary on the *Vienna Convention* has clarified that the subsequent practice referred to by article 31(3)(b) must be common to *all* the parties to the treaty sought to be interpreted.³⁰⁴ Subsequent practice that is not common to all parties may nevertheless "constitute a supplementary means of interpretation within the meaning of Article 32 of the [Vienna] Convention."³⁰⁵ This provision is addressed below.

3. Supplementary Means of Interpretation

Recourse may be had to supplementary means of interpretation in order to confirm the meaning flowing from the application of the general rule of interpretation.³⁰⁶ Supplementary means include, but are not limited to, the preparatory work of the treaty and the circumstances of its conclusion.³⁰⁷ Several sources are relevant in this regard. First, in 1980, an OAU and UNHCR working group promulgated guidelines to assist OAU member states in domesticating their obligations under the *1969 Convention*.³⁰⁸ According to section 11 of those guidelines, "persons con-

²⁹⁸ See Guy S Goodwin-Gill, "The Search for the One, True Meaning..." in Guy S Goodwin-Gill & Hélène Lambert, eds, *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (Cambridge, UK: Cambridge University Press, 2010) 204 at 214 [Goodwin-Gill, "One, True Meaning"].

²⁹⁹ McAdam, *Complementary Protection*, *supra* note 188 at 213.

³⁰⁰ (Uganda), No 21 of 2006.

³⁰¹ See Marina Sharpe & Salima Namusobya, "Refugee Status Determination and the Rights of Recognized Refugees Under Uganda's Refugees Act, 2006" 24 *Int'l J Refugee L* [forthcoming in 2012].

³⁰² *Refugees Act, 1998* (S Afr), No 130 of 1998.

³⁰³ See Mandal, *supra* note 40 at xii.

³⁰⁴ See e.g. Sinclair, *supra* note 137 at 138; Aust, *supra* note 260 at 241-43; Gardiner, *supra* note 289 at 227; Goodwin-Gill, "One, True Meaning", *supra* note 298 at 209.

³⁰⁵ Sinclair, *supra* note 137 at 138.

³⁰⁶ See *VCLT*, *supra* note 12, art 32.

³⁰⁷ See *ibid.*

³⁰⁸ See Jackson, *supra* note 91 at 194.

sidered as refugees according to the ‘extended’ OAU refugee definition are entitled to the rights and are subject to the duties defined [in] the 1951 United Nations Refugee Convention.”³⁰⁹ A second supplementary means of interpretation, already discussed above, is the domestic refugee legislation of certain states that are party to the *1969 Convention*. Third, and most important, is the history behind the *1969 Convention*. While no official set of *travaux préparatoires* is available for the *1969 Convention*, its drafting history supports the interpretation reached here:³¹⁰ the *1969 Convention* does not create second-class refugees excluded from the *1951 Convention*’s rights framework.

4. General Principles of International Law

This conclusion, reached by interpreting relevant clauses of the *1969 Convention* in line with the *Vienna Convention*, is confirmed by relevant general principles of international law. The *1969 Convention*’s legal regime may be characterized as a special regime in relation to the *1951 Convention*’s more general regime. According to the International Law Commission:

The scope of special laws is by definition narrower than that of general laws. It will thus frequently be the case that a matter not regulated by special law will arise in the institutions charged to administer it. In such cases, the relevant general law will apply.³¹¹

In this case, the special *1969 Convention* does not detail the rights to which refugees are entitled once they are recognized as such; the *1951 Convention*’s general regime thus serves to fill the gap.

The principle of *lex posterior derogat legi priori*, though not strictly applicable because the parties to the *1969 Convention* are not identical to those to of the *1951 Convention*, is nevertheless also instructive. The principle provides that an earlier treaty applies only to the extent that it is not inconsistent with a later treaty concluded among the same parties.³¹² The application of *1951 Convention* rights to article I(2) refugees is not inconsistent with the *1969 Convention*; indeed application of the *1951 Convention*’s rights framework is in keeping with the objects and purposes of the *1969 Convention*.

³⁰⁹ *Ibid* at 195.

³¹⁰ See Marina Sharpe, “Engaging with Refugee Protection? The Organization of African Unity and African Union Since 1963”, *New Issues in Refugee Research: Research Paper No 226*, (Geneva: UNHCR Policy Development and Evaluation Series, 2011) at 5-17, online: UNHCR: The UN Refugee Agency <<http://www.unhcr.org/4edf8e959.pdf>>.

³¹¹ *Report on the Work of Its Fifty-Eighth Session*, UNGAOR, 61st Sess, Supp No 10, UN Doc A/61/10, (2006) chapter XII.D.II at para 251(15).

³¹² See *ibid* at para 251(24).

Conclusion

This paper began by surveying the *1969 Convention's* legal innovations. It went on to analyze one such innovation—the unique refugee definition—in order to question the common view that it is far broader than the international refugee definition. Finally, this paper addressed the omission of a rights framework from the *1969 Convention*. The discussion of the article I(2) refugee definition revealed that three of the four 1969 Events are now largely irrelevant, that the definition is not entirely objective, and that the *1969 Convention* does not apply only to groups, nor was it drafted with a view to allowing the group determination of refugee status. These insights about the article I(2) refugee definition will, I hope, go some way toward correcting common misconceptions about it and, taken together, indicate that the definition is not quite as expansive as is often suggested.

The analysis of the standards of treatment to which article I(2) refugees are entitled suggests that, in states party to both the *1951* and *1969 Conventions*, there can be no suggestion that article I(2) refugees enjoy fewer rights than their article I(1) or *1951 Convention* counterparts. Ultimately, it seems that the omission of a rights framework from the *1969 Convention* was premised upon the specific objectives of the treaty and the futility, to use McAdam's language,³¹³ of including a cumbersome rights framework when a simpler legal option existed. Thus the *1969 Convention* was not only innovative in, among other things, incrementally expanding the range of individuals who could qualify for refugee status. In applying the content of the existing universal instrument's status to a broadened class of individuals, the drafters found a pioneering yet pragmatic way of ensuring that refugees in Africa are guaranteed the same rights as refugees elsewhere, but that issues particular to African refugees are not neglected. Indeed, "[t]he substantive articles of the ... regional agreement are intended to create obligations to be assumed by states which are parties to it in addition to those undertaken by becoming parties to the [1951] Convention and the [1967] Protocol."³¹⁴

However, this approach leaves certain refugees—those in states party to the *1969 Convention* but not its universal counterpart, or in states that are party to the *1951* and *1969 Conventions* but not the *1967 Protocol*, or in states party to the *1951* and *1969 Conventions* that have retained the

³¹³ McAdam, *Complementary Protection*, *supra* note 188 at 209-10.

³¹⁴ Chartrand, *supra* note 202 at 271.

former instrument's geographical limit³¹⁵—in a precarious situation. Rwelamira explains:

[B]ecause the OAU Convention is regarded as complementary to the UN Convention it has no provisions dealing with substantive or minimum rights, a problem which becomes real when a state member of the OAU Convention is not a party to the UN Convention.³¹⁶

This is why Goundiam argues that to be effective, the *1969 Convention* must be “completed by states ratifying ... other more exhaustive instruments.”³¹⁷

It is, however, largely a theoretical problem, which, in practice, extends well beyond the borders of states such as Libya (which is party to the *1969*, but not the *1951, Convention*). Despite *1951 Convention* guarantees, refugees all over Africa find their rights systemically violated; moreover, they are usually without recourse for such violations. In addition to widespread ratification of the *1951 Convention*, this convention and its regional counterpart must be implemented and enforced.

³¹⁵ In Africa, Madagascar is not party to the *1967 Protocol*, and the Republic of Congo and Madagascar continue to recognize the *1951 Convention's* geographical limit.

³¹⁶ “Some Reflections”, *supra* note 32 at 178.

³¹⁷ *Supra* note 3 at 12.