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**WHO IS A REFUGEE IN AFRICA? A
PRINCIPLED FRAMEWORK FOR
INTERPRETING AND APPLYING AFRICA'S
EXPANDED REFUGEE DEFINITION**

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Tamara Wood*

ABSTRACT

Africa's expanded refugee definition – Article I(2) of the 1969 Convention – provides the legal basis of protection for a significant number of the world's refugees, a gateway to a host of rights aimed at protecting refugees from future harm and preserving their dignity until a durable solution can be found. The expansive nature of the African definition has seen it praised for being more humanitarian, more reflective of current causes of displacement and an exemplar for the development of refugee protection regimes elsewhere. Despite this, the scope of the definition and the meaning of its terms remain poorly understood in both literature and practice. Attempts to interpret the definition to date have been largely superficial and often lacking in any principled interpretative framework. This undermines its implementation in practice, potentially risking the lives and security of those entitled to protection as refugees in Africa.

This article sets out a principled framework for interpreting and applying Africa's expanded refugee definition. The framework is drawn from international law principles of treaty interpretation, as set out in the Vienna Convention on the Law of Treaties and customary international law. This article goes beyond merely reciting the relevant principles, however: it analyses their scope, applicability to Africa's expanded refugee definition and implications for the interpretation of the definition's terms. It also identifies, and describes in detail, four key principles for interpreting the expanded refugee definition. These four key principles are critical to addressing the shortcomings of existing understandings of the definition and some of the main controversies that arise in its interpretation and application. They also provide a practical and accessible source of guidance for refugee status decision-makers and others that

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could assist in promoting consistency, transparency and fairness in refugee status determination within African states.

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1. INTRODUCTION

The ‘expanded refugee definition’ in Article I(2) of the 1969 OAU *Convention Governing the Specific Aspects of Refugee Problems in Africa* (1969 Convention) is the treaty’s ‘most celebrated feature’.¹ It appears alongside the 1951 Convention’s ‘universal refugee definition’,² which is replicated in Article I(1) of the 1969 Convention, and provides:

The term ‘refugee’ shall *also* apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.³

Africa’s expanded refugee definition provides a gateway to protection for refugees in Africa, and extends the scope of refugee protection on the continent beyond individuals with a well-founded fear of persecution to those fleeing more widespread and indiscriminate forms of harm. The expanded refugee definition has been widely praised for its generous scope and humanitarian spirit,⁴ for depoliticising the grant of asylum,⁵ and for ‘translat[ing] the core meaning of refugee status to the reality of the developing world’.⁶ Despite this, the definition’s scope and meaning remain poorly understood. Unlike the universal refugee definition, which has been the subject of a plethora of case law, institutional guidance and

¹ Micah Bond Rankin, ‘Extending the Limits or Narrowing the Scope: Deconstructing the OAU Refugee Definition Thirty Years On’ (2005) 21 *South African Journal on Human Rights* 406, 409.

² Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (1951 Convention) art 1A(2). The 1951 Refugee Convention is often described as the ‘universal’ refugee protection instrument, due to its international applicability and widespread ratification by states. See generally Gilad Ben-Nun, ‘From Ad Hoc to Universal: The International Refugee Regime from Fragmentation to Unity 1922-1954’ (2015) 34(2) *Refugee Survey Quarterly* 23.

³ OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (opened for signature 10 September 1969, entered into force 20 June 1974) 1001 UNTS 14691 (1969 Convention) art 1 (emphasis added).

⁴ See 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, 90; Anais Tuepker, ‘On the Threshold of Africa: OAU and UN Definitions in South African Asylum Practice’ (2002) 15(4) *Journal of Refugee Studies* 409; Michael Kagan, ‘Legal Refugee Recognition in the Urban South: Formal v. De Facto Refugee Status’ (2007) 24(1) *Refugee* 11.

⁵ Okoth-Obbo, above n 4, 90.

⁶ James C. Hathaway, *The Law of Refugee Status* (Butterworths 1993) 17. See also Eduardo Arboleda, ‘Refugee Definition in Africa and Latin America: The Lessons of Pragmatism’ (1991) 3(2) *International Journal of Refugee Law* 185, 186-7.

scholarly analysis, there has been ‘a remarkable dearth of critical legal analysis of the 1969 Convention’,⁷ including its expanded refugee definition.

While the lack of scrutiny of the expanded refugee definition may not have mattered in the decades immediately following the adoption of the 1969 Convention, the social and political context in which the definition applies has changed considerably in the past fifty years. The ‘golden age’ of asylum in Africa during the 1960s, 70s and 80s has given way to more restrictive and legalised approaches to refugee protection,⁸ with refugees increasingly viewed as potential threats to African states’ security and social stability.⁹ Meanwhile, institutional actors, at both the international and regional levels, have begun to engage more closely with African refugee law and policy frameworks, exploring their potential in the context of new and emerging causes of displacement.¹⁰

Like any legal provision, Africa’s expanded refugee definition must be interpreted in order to determine its meaning and applicability to particular individuals or situations. Within both literature and practice, there is considerable disagreement on key questions regarding the definition’s scope and application, including: are the definition’s criteria for refugee status purely ‘objective’ – concerned only with conditions in the refugee’s country of origin – or do they also require consideration of the refugee’s individual, subjective circumstances? Do terms in the definition such as ‘aggression’, ‘occupation’ and ‘public order’ carry the same meaning there as they do elsewhere in international law (for example, under international humanitarian law)? What role could the definition (and the 1969 Convention) play in addressing causes of displacement not traditionally thought to give rise to refugee claims, such as that which occurs in the context of disasters and climate change? And to what extent is the definition, in fact, ‘expanded’ from its universal counterpart in the 1951 Convention?

In the current African refugee protection environment, vague references to the expanded refugee definition’s generous scope and humanitarian tone are insufficient to address these

⁷ Marina Sharpe, ‘The 1969 African Refugee Convention: Innovations, Misconceptions, and Omission’ (2012) 58(1) McGill Law Journal 95, 99.

⁸ See Jeff Crisp, ‘Forced Displacement in Africa: Dimensions, Difficulties, and Policy Directions’ (2010) 29 Refugee Survey Quarterly 1, 3; Marina Sharpe, *The Regional Law of Refugee Protection in Africa* (OUP, 2018) 5.

⁹ Sharpe, above n 8, 6.

¹⁰ See further below, section 3.2.

and other questions regarding the meaning of its terms. They leave decision-makers unsure of when and how to apply it, and refugees with little assurance that the protection they are entitled under the 1969 Convention will be available to them in reality.

This article aims to address the current gap in understandings of Africa's expanded refugee definition – not by providing a detailed analysis of the terms of the definition itself, but by examining the *way* it ought to be interpreted and applied by those charged with implementing it in practice. The 1969 Convention is a binding international treaty and its provisions, including the definition, represent the crucial point of agreement among its states parties regarding the scope and content of refugee protection in the African context. A principled approach to the definition's interpretation is essential to facilitate fairness and consistency within African states' refugee status decision-making procedures, and to ensure that states parties to the 1969 Convention uphold their refugee protection obligations.

This article begins with an overview of the expanded refugee definition and its current place in African states' law and practice. It outlines the key changes in understandings of and approaches to the definition over the past 50 years, from historical assumptions regarding the definition's generous and flexible nature, to the more restrictive policies and 'legalised' approaches to refugee status determination in Africa today. It then sets out a principled framework for interpreting and applying the definition's terms. This framework is drawn from established international law principles of treaty interpretation, found in the *Vienna Convention on the Law of Treaties* (VCLT)¹¹ and under customary international law.¹² This article goes beyond merely reciting the relevant principles, however: it articulates, and analyses, four key principles for the definition's interpretation. For each key principle, this article describes the source and substance in international law; explains the importance to the definition's interpretation; and provides some preliminary suggestions regarding the implications for the scope of the definition, including in relation to the interpretative questions set out above.

The four key principles of interpretation set out in this article are not the only principles that apply to the expanded refugee definition – all international law principles of treaty

¹¹ Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 31(1).

¹² See further below, section 4.1.

interpretation apply, where there is a use for them. However, the four key principles set out here include are the most important, and the ones that will arise most often in the definition's interpretation. They are critical to addressing the key shortcomings in existing approaches to understanding the definition, and could provide an accessible source of guidance to decision-makers and others charged with implementing it in practice.

2. AFRICA'S EXPANDED REFUGEE DEFINITION IN LAW AND PRACTICE

The Article I(2) expanded refugee definition is arguably the 1969 Convention's most important feature. As noted above, it has been widely praised for humanitarianising the refugee issue¹³ and depoliticising the grant of asylum.¹⁴ It is said to be 'more realistic [than the universal refugee definition] about the nature of contemporary refugee scenarios',¹⁵ invoke the spirit of international cooperation¹⁶ and provide 'a valuable addition [to refugee law] specifically designed to meet the requirements of African reality'.¹⁷ The definition has even inspired the development of refugee protection regimes elsewhere, most notably in Latin America.¹⁸ Commentators describe Africa's expanded refugee definition as 'the most influential conceptual standard of refugee status apart from the [1951] Convention definition itself'¹⁹ and one of the chief contributions of Africa to international law-making in the post-colonial era.²⁰

¹³ Okoth-Obbo, above n 4, 90

¹⁴ *ibid*; Michael Kagan, 'Legal Refugee Recognition in the Urban South: Formal v. De Facto Refugee Status' (2007) 24(1) *Refugee* 11; Jacob van Garderen and Julie Ebenstein 'Regional Developments: Africa' in Andreas Zimmerman (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011) 186; Isabelle Gunning, 'Expanding the International Definition of Refugee: A Multicultural View' (1990) 13(1) *Fordham International Law Journal* 35, 37.

¹⁵ Tuepker, above n 4, 411; see also Arboleda, above n 6, 205.

¹⁶ Van Garderen & Ebenstein, above n 14, 186; Gunning, above n 14, 37.

¹⁷ Emmanuel K. Dadzie, Goran Melander and Peter Nobel, 'Report of the Seminar Legal Aspects on the African Refugee Problem' in Goran Melander and Peter Nobel (ed), *African Refugees and the Law* (Almqvist & Wiksell International, 1978) 77, cited Rankin, above n 1, 410.

¹⁸ Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, adopted by the Colloquium, held at Cartagena, Colombia, 19–22 Nov 1984, par III(3). See generally Eduardo Arboleda, 'The Cartagena Declaration of 1984 and its Similarities to the 1969 Convention – A Comparative Perspective' (1995) *Special Issue International Journal of Refugee Law* 87, 94. For a valuable overview of the global influence of Africa's expanded refugee definition see Sharpe, above n 8, 36–8.

¹⁹ Hathaway, above n 6, 19; see also Okoth-Obbo, above n 4, 112.

²⁰ Tiyanjana Maluwa, 'International Law-Making in Post-Colonial Africa: The Role of the Organization of African Unity' (2002) 49(1) *Netherlands International Law Review* 81, 89, 99.

Under international law, the expanded refugee definition imposes binding obligations on the 45 African states parties to the 1969 Convention to identify and protect those who meet its criteria.²¹ Those who fall within the definition are entitled under the 1969 Convention to protection against *refoulement*²² and discrimination,²³ the right to a travel document,²⁴ and assistance in securing resettlement²⁵ or voluntary repatriation.²⁶ In addition, the 1969 Convention's status as the 'regional complement' of the 1951 Convention²⁷ has been convincingly argued to mean that refugees who qualify under the expanded refugee definition should also be afforded the full catalogue of rights set out in the 1951 Convention.²⁸ This includes freedom of religion,²⁹ access to domestic courts,³⁰ and rights to employment,³¹ housing³² and public education.³³

The expanded refugee definition has been incorporated into the domestic legislation of 29 of the 45 African states parties to the 1969 Convention.³⁴ A further six states parties provide for

²¹ For a list of signatories, including dates of signature, see <<http://www.achpr.org/instruments/refugee-convention/ratification/>> accessed 21 March 2019. Whether Morocco constitutes a 46th state party is somewhat ambiguous. Morocco ratified the 1969 Convention in 1974. It withdrew from the OAU in 1984, but never formally renounced any of the OAU treaties. It has since been readmitted as a member of the AU (in 2017). Morocco is listed as a state party to the 1969 Convention by the UN, but not by the AU. See <<https://treaties.un.org/pages/showDetails.aspx?objid=080000028010432f>> accessed 21 March 2019. See generally, Tiyanjana Maluwa, 'Ratification of African Union Treaties by Member States: Law, Policy and Practice' (2012) 13 Melbourne Journal of International Law 1, esp n 95.

²² 1969 Convention, art II(3).

²³ *ibid*, art IV.

²⁴ *ibid*, art VI.

²⁵ *ibid*, art II(1).

²⁶ *ibid*, art V.

²⁷ *ibid*, art VII.

²⁸ In UNHCR's view, '[a] difference in treatment would be neither reasonable nor objectively justified, would disregard the complementary character of the 1969 OAU Convention, and would amount to discrimination.' UNHCR, 'Key Legal Considerations on the Standards of Treatment of Refugees Recognized under the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa' (19 December 2017). See also Sharpe, above n 8, 124ff; Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, 2007) 38, 213; Jean-François Durieux and Agnès Hurwitz, 'How Many is Too Many? African and European Legal Responses to Mass Influxes of Refugees' (2004) 47 German Yearbook of International Law 105, 126; Bonaventure Rutinwa, 'Prima Facie Status and Refugee Protection' (2002) UNHCR New Issues in Refugee Research Working Paper No. 69, 16; Bonaventure Rutinwa, 'Relationship between the 1951 Refugee Convention and the 1969 OAU Convention on Refugees' in Volker Türk, Alice Edwards and Cornelis Wouters (eds) *In Flight from Conflict and Violence: UNHCR's Consultations on Refugee Status and Other Forms of International Protection* (CUP 2017) esp 95-6.

²⁹ 1951 Convention, art 4.

³⁰ *ibid*, art 16.

³¹ *ibid*, arts 17, 18.

³² *ibid*, art 21.

³³ *ibid*, art 22.

³⁴ These states are: Angola, Burkina Faso, Burundi, Cameroon, DRC, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Malawi, Mali, Mozambique, Niger, Nigeria, Rwanda, Sierra Leone, South Africa, South Sudan, Sudan, Tanzania, Togo, Uganda, Zambia and Zimbabwe. The definition has also been incorporated into the domestic legislation of Morocco. See above, n 21.

the direct application of treaty law at the domestic level.³⁵ This means that the definition provides a legally enforceable right to refugee protection at the domestic level in a total of 35 African states parties to the 1969 Convention. This is significant, as ‘domestic legislation and law has ... become the main vehicle for refugee law progress within the [African] continent’.³⁶

Despite its solid legal grounding, the implementation of the expanded refugee definition has been patchy at best. While there has been no comprehensive study of its application within African states’ refugee status determination procedures in practice,³⁷ a small number of empirical studies suggests that the definition is frequently ignored or misunderstood,³⁸ with many refugee status decision-makers considering claims for refugee status almost exclusively under the terms of the universal refugee definition.³⁹ This includes in cases where the claim is rejected and where the expanded refugee definition’s potential relevance is evident.⁴⁰ The sometimes poor implementation of the definition has been attributed to a lack of capacity, resources and political will among African states.⁴¹ However, as will be discussed below, a lack of understanding of the definition’s scope and meaning among decision-makers also impedes its implementation.

³⁵ These states are: Benin, Congo, Côte d’Ivoire, Egypt, Mauritania and Senegal. However, the direct application of treaty law in domestic law may be subject to the treaty’s publication in the state concerned, or a domestic court’s characterisation of the treaty provision as ‘self-executing’. See generally Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2000) 74ff; Tiyanjana Maluwa, *International Law in Post-Colonial Africa* (Brill, 1999) esp Ch 1.

³⁶ Okoth-Obbo, above n 4, 97.

³⁷ This is due largely to the paucity of available information on such procedures and a near total lack of case law. See further below, section 3.1.

³⁸ See Marina Sharpe, ‘The 1969 OAU Refugee Convention and the Protection of People fleeing Armed Conflict and Other Situations of Violence in the Context of Individual Refugee Status Determination’ (2013) UNHCR Legal and Protection Policy Research Series; Tamara Wood, ‘Expanding Protection in Africa? Case Studies of the Implementation of the 1969 African Refugee Convention’s Expanded Refugee Definition’ (2014) 26(4) *International Journal of Refugee Law* 555; Roni Amit, ‘No Refuge: Flawed Status Determination and the Failures of South Africa’s Refugee System to Provide Protection’ (2011) 23 *International Journal of Refugee Law* 458; Tal Schreier, ‘A Critical Examination of South Africa’s Application of the Expanded OAU Refugee Definition: Is Adequate Protection Being Offered Within the Meaning of the 1969 OAU Refugee Convention?’ (2008) 25(2) *Refugee* 53.

³⁹ Wood, above n 38, 564-5, 573-4. Sharpe, above n 38, 8-9; Amit, above n 38, 473; Schreier, above n 38, 57.

⁴⁰ Wood, above n 38, 564-5.

⁴¹ See, eg, Kibret Markos, ‘The Treatment of Somali Refugees in Ethiopia under Ethiopian and International Law’ (1997) 9(3) *International Journal of Refugee Law* 365; Bonaventure Rutinwa, ‘Identifying Gaps in Protection Capacity: Tanzania’ (2005) Report for the UNHCR Strengthening Protection Capacity Project, esp 5-6; Wood, above n 38, 574-8.

3. UNDERSTANDING THE DEFINITION: THE NEED FOR A NEW APPROACH

3.1. Existing understandings of Africa's expanded refugee definition

Existing understandings of Africa's expanded refugee definition are largely superficial and consist mostly of general characterisations and assumptions rather than a close reading of its terms. Commentary on the definition has tended to emphasise its expansive nature and how it differs from (is broader than) the universal refugee definition. The expanded refugee definition's criteria for refugee status have been described as predominantly 'objective' in nature, focusing on general conditions or events in the country of origin rather than the individual's subjective fear.⁴² The generalised nature of the definition's enumerated refugee-producing events – external aggression, occupation, foreign domination and events seriously disturbing public order – is said to make the definition better suited to large-scale population displacement and situations of mass influx,⁴³ including in the context of war, generalised violence and even natural disasters.⁴⁴ The stipulation that the relevant harm occur 'in the whole *or part*' of the refugee's country of origin is said to remove the 1951 Convention's 'internal flight alternative' requirement, meaning that the refugee need not seek protection elsewhere in his or her own country before qualifying for it elsewhere.⁴⁵

Beyond general characterisations like these, the expanded refugee definition 'has remained largely beyond serious scrutiny'.⁴⁶ Historical analyses of the 1969 Convention have been rightly criticised for providing 'accolades rather than rigorous analyses'.⁴⁷ Most major

⁴² Okoth-Obbo, above n 4, 112; van Garderen & Ebenstein, above n 14, 190; Medard Rwelamira, 'Two Decades of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa' (1989) 1(4) *International Journal of Refugee Law* 557; Emmanuel Opoku Awuku, 'Refugee Movements in Africa and the OAU Convention on Refugees' (1995) 39(1) *Journal of African Law* 79, 81.

⁴³ Ivor Jackson, *The Refugee Concept in Group Situations* (Martinus Nijhoff Publishers, 1999) 193; Alice Edwards, 'Refugee Status Determination in Africa' (2006) 14 *African Journal of International and Comparative Law* 204, 211; Tuepker, above n 4, 411.

⁴⁴ On war and generalised violence, see Sharpe, above n 38. The inclusion of natural disasters in the expanded refugee definition is contentious. See Tamara Wood, 'Protection and Disasters in the Horn of Africa: Norms and Practice for Addressing Cross-Border Displacement in Disaster Contexts' (2013) Technical Paper for the Nansen Initiative Horn of Africa Regional Consultation, 24-29; Sharpe, above n 8, 49-52.

⁴⁵ UNHCR, 'Guidelines on International Protection: "Internal Flight or Relocation Alternative within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees" UN doc HCR/GIP/03/04 (23 July 2003) para 5; Hathaway, above n 6, 18.

⁴⁶ Sharpe, above n 7, 97.

⁴⁷ Rankin, above n 1, 410. See also Okoth-Obbo, above n 4, 79-80; Edwards, above n 43, 207-8; Rachel Murray, *Human Rights in Africa: From the OAU to the African Union* (Cambridge University Press, 2004) 190; Pierre-Michel Fontaine, 'The Governance of the Refugee Problem in Africa: A Research Agenda' (2006) 25(4) *Refugee Survey Quarterly* 67, 68-9; University of Oxford Refugee Studies Centre, 'Refugee Status

scholarly works on international refugee law contain only brief discussion of Africa's regional complement to the 1951 Convention,⁴⁸ and only a handful of dedicated articles or book chapters have addressed the expanded refugee definition in any detail.⁴⁹ The lack of detailed attention to the definition has been recognised by commentators, who note that 'insufficient guidance has been given to decision-makers on how to interpret [it]'.⁵⁰

In recent years, there have been some steps towards remedying this gap. A small number of scholars has begun to engage in more depth with the definition's history, substance and application. Articles by Rankin and Edwards provided the first attempts at a comprehensive interpretation of the definition's terms.⁵¹ These have been cited in subsequent literature,⁵² as well as in practice.⁵³ However, both Edwards and Rankin fail to articulate a clear framework or rationale for the interpretative views they advance. Reliance on such a limited body of analysis should therefore be of concern. Sharpe's analysis of the definition's drafting history and its respective components – part of a larger study of regional refugee law in Africa – is more developed.⁵⁴ It includes an overview of the VCLT principles of interpretation 'to

Determination and Rights in Southern and East Africa' (2010) International Workshop Report, Kampala, Uganda, 16-17 November 2010, 1.

⁴⁸ See, eg, Zimmerman, above n 14 (one chapter on the 1969 African Refugee Convention); Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007) (passing references only); Hathaway, above n 6 (Section 1.4.3 is entitled 'The Organization of African Unity Definition of Refugee Status' and goes for 3 pages); Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003) (passing references only).

⁴⁹ The main articles and book chapters to discuss the expanded refugee definition are: Sharpe, above n 7; Sharpe, above n 8, Ch 3(A); Wood, above n 38; Tamara Wood, 'The African War Refugee: Using IHL to Interpret the 1969 African Refugee Convention's Expanded Refugee Definition' in David James Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill, 2014); Edwards, above n 43; Rankin, above n 1; Okoth-Obbo, above n 4; Jackson, above n 43; Durieux and Hurwitz, above n 28; van Garderen & Ebenstein, above n 14; Cristiano D'Orsi, 'The AU Convention on Refugees and the Concept of Asylum' (2012) 7 *Pace International Law Review* 225; Schreier, above n 38; Arboleda, above n 6; Murray, above n 47, esp Chapter 7; Tuepker, above n 4; Pirkko Kourula, *Broadening the Edges: Refugee Definition and International Protection Revisited* (Springer, 1997); Rwelamira, above n 42; Awuku, above n 42.

⁵⁰ Edwards, above n 43, 204. See also University of Oxford Refugee Studies Centre, above n 47, 1.

⁵¹ Edwards, above n 43; Rankin, above n 1. A number of other articles discuss aspects of the expanded refugee definition's meaning and how it is different from the 1951 Convention's universal refugee definition; however, they do not purport to provide a comprehensive and systematic analysis of the definition's terms. Many rely largely on the analyses of Rankin and Edwards.

⁵² See, eg, Rankin, above n 1, which is the primary source provided for claims about the definition's meaning in Schreier, above n 38, and van Garderen & Ebenstein, above n 14. Rankin's analysis is also cited numerous times in Edwards, above n 43.

⁵³ Rankin's article was the only source of guidance on the expanded refugee definition identified during interviews by the author with representatives of UNHCR and the Refugee Appeal Board in South Africa.

⁵⁴ Sharpe, above n 8, 38-65.

background the interpretive exercise’,⁵⁵ and draws on more concrete evidence of how the definition has been understood and applied in practice.⁵⁶

These three detailed analyses of the expanded refugee definition, though small in number, have made a valuable contribution to current understandings of the definition, in particular by emphasising its continued relevance to displacement in Africa. They have also challenged some of the common characterisations of the definition set out above, arguing instead that the definition *does* include a subjective component,⁵⁷ was not designed for mass influx situations,⁵⁸ and indeed ‘is not necessarily quite as inclusive or broad as most commentators suggest’.⁵⁹ However, there remains considerable scope for further scrutiny of the way in which the definition ought to be interpreted, including exactly how international law principles of treaty apply to its respective terms and how differing views on its scope and meaning should be reconciled.⁶⁰ Indeed, the authors themselves conclude that a ‘significant body of research remains to be done’.⁶¹

In African states in practice, evidence of detailed engagement with the expanded refugee definition is even more scarce. There is a notable dearth of case law or institutional guidance on the definition’s terms. Accessing written refugee status decisions from African states is nearly impossible, as most states do not provide such decisions to applicants, let alone make them publicly available.⁶² Even the small number of decisions obtained by researchers on the definition ‘tend to contain limited legal reasoning that might reveal how [the definition] is understood and applied’.⁶³ African regional institutions – including the AU and its various

⁵⁵ *ibid* 38.

⁵⁶ As Sharpe notes, while the available evidence is clearly not sufficient to establish the agreement of the parties to the 1969 Convention, pursuant to Article 31(3)(b) of the VCLT, the small number of refugee status decisions available ‘are certainly – and at the very least – instructive’. *ibid* 39-40.

⁵⁷ Sharpe, above n 38, 12; Edwards, above n 43, 228-9. See generally Sharpe, above n 8, 56ff.

⁵⁸ Durieux and Hurwitz, above n 28, 117. Durieux and Hurwitz acknowledge that the objective focus of the definition could make it easier to apply in mass influx situations, but assert that ‘it would be inappropriate to infer from this practical reality any sort of legal intent’.

⁵⁹ Sharpe, above n 7, 112.

⁶⁰ Even Sharpe’s analysis, which is preceded by an overview of some of the main VCLT principles of interpretation, rarely articulates how or why they support the interpretative arguments advanced.

⁶¹ Rankin, above n 1, 26. See also Edwards, above n 43, 232.

⁶² The only published decisions considering the expanded definition known to the author are a small handful of decisions from Benin’s Commission Nationale d’Assistance aux Réfugiés. South Africa’s Refugee Appeal Board has a mandate to publish its decision; however, to date only two decisions have been published, neither of which address the expanded refugee definition. See generally Sharpe, above n 38, 1; Edwards, above n 43, 204; University of Oxford Refugee Studies Centre, above n 47, 1.

⁶³ Sharpe, above n 38, 2. See also Wood, above n 38, 575; Amit, above n 38, 464ff.

organs – have to date been largely silent on the definition’s scope or application.⁶⁴ Until recently, the same was true of UNHCR, whose guidelines on the interpretation and application of refugee law have historically not addressed Africa’s regional treaty.⁶⁵ Refugee status decision-makers evince a variety of views on the definition’s scope, terms and application to specific populations.⁶⁶ Some are reluctant to apply it at all, given their uncertainty about its scope and implications.⁶⁷

The largely superficial approach to understanding the expanded refugee definition that has dominated both literature and practice has been defended by some, who argue that closer analysis of the definition’s terms is either unnecessary, because the ‘criteria on which refugee status may be granted under this definition are self-evident in the broad grounds listed’,⁶⁸ or undesirable, because it could ‘[bring] the definition in the midst of political controversy and ... negatively affect its validity’.⁶⁹ However, even if this was true once, the refugee protection environment in Africa within which the definition must be applied has changed considerably in the years since 1969. In the current context, a new, more rigorous approach to understanding the definition’s terms is required.

3.2. Africa’s changing refugee protection environment and the need for a more principled understanding of the expanded refugee definition

⁶⁴ See Edwards, above n 43, 207. Though see further below, section 3.2.

⁶⁵ There have been a few brief references. See UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, UN doc HCR/1P/4/ENG/REV. 3 (1979, reissued December 2011) n 22; UNHCR, ‘Guidelines on International Protection: “Internal Flight or Relocation Alternative” within the Context of Article 1A(2) of the 1951 Refugee Convention and/or 1967 Protocol relating to the Status of Refugees’ UN doc HCR/GIP/03/04 (23 July 2003) para 5. Even UNHCR’s training manual for its own refugee status decision-makers devotes only four pages to the expanded concept of a refugee, in contrast with some 51 pages on the universal refugee definition. UNHCR, ‘Manual on Mandate RSD: A Reference Tool for UNHCR Staff’ (1 October 2005) (copy on file with the author).

⁶⁶ See generally Wood, above n 38.

⁶⁷ Refugee status decision-makers and officials in Kenya and South Africa have expressed reluctance to invoke the definition for fear of ‘opening the floodgates’, or providing ‘an open cheque’ to persons wishing to enter and remain in the country. Wood, above n 38, 576-7. Even UNHCR has declined to apply the definition ‘largely because there is a lack of doctrinal clarity with respect to this provision of the [1969] Convention’. Jeff Crisp and Esther Kiruga, ‘Refugee Protection and International Migration: A Review of UNHCR’s Role in Malawi, Mozambique and South Africa’ UNHCR Policy Development and Evaluation Service (2010) 21.

⁶⁸ Lawyers Committee on Human Rights, *African Exodus: Refugee Crisis, Human Rights and the 1969 OAU Convention* (The Committee, 1995) 29. A similar sentiment – usually in the form of ‘we know a refugee when we see one’ – was expressed by some of the African refugee law practitioners and scholars interviewed by the author in South Africa and Kenya in 2012. See generally Wood, above n 38.

⁶⁹ Kourula, above n 49, 150.

The period surrounding the adoption of the 1969 Convention has been described as the ‘golden age’ of asylum and the era of ‘open door’ policies towards refugees in Africa.⁷⁰ Refugee flows during this period were largely the product of decolonisation from European rule and the transition to independence, and African states ‘readily admitted all those in search of security and safety’.⁷¹ Since the 1990s, however, Africa has more often been noted for its restrictions on asylum and refugees’ rights, with states pursuing policies of encampment, containment and limited rights for refugees.⁷² The Kenyan government’s 2016 attempt to close Dadaab refugee camp and force the return of hundreds of thousands of Somali refugees provides one salient example of the hostile protection environment now faced by refugees in some African states.⁷³

Not all African states are closing their doors to refugees. Uganda, for example, has been widely praised in recent years for its progressive approach to refugee protection, allowing refugees the right to work, move freely within the country and access public services such as health and education.⁷⁴ However, even in these more welcoming and rights-protecting environments, refugee protection is becoming more strictly regulated. In Uganda, refugee protection practices that were historically based on custom are now governed by domestic laws and regulations, enforceable via national courts.⁷⁵ Indeed, almost all of the 29 African states that have incorporated the expanded refugee definition into their domestic legislation

⁷⁰ See respectively Crisp, above n 8, 3; Bonaventure Rutinwa, ‘The End of Asylum? The Changing Nature of Refugee Policies in Africa’ (2002) 21(1) *Refugee Survey Quarterly* 12, 15-16. See generally James Schneider, ‘The refugee crisis in southern and central Africa’ (1999) *Global Dialogue* (vol 4); Khoti Kamanga, ‘International Refugee Law in East Africa: An Evolving Regime’ (2002) 3(1) *Georgetown Journal of International Affairs* 25, esp 27.

⁷¹ Rutinwa above n 70, 12.

⁷² *ibid*; Sharpe, above n 8, esp 5-6; Crisp, above n 8, 3-6; Kamanga, above n 70, 27-8; Monica Kathina Juma, ‘The Compromised Brokers: NGOs and Displaced Populations in East Africa’ in Paul Tiyambe Zeleza and Philip J McConnaughay, *Human Rights, the Rule of Law and Development in Africa* (University of Pennsylvania Press, 2004) 239-40.

⁷³ See ‘Dadaab refugee camp: World’s largest camp faces closure by Kenyan government’ (20 May 2016) ABC News <<http://www.abc.net.au/news/2016-05-20/kenya-threatens-to-close-dabaab-refugee-camp/7428306>> accessed 21 March 2019. The proposal was ultimately unsuccessful and Dadaab remains open. The South African government’s increasingly hard line and securitised stance on immigration, including proposals for detention and the removal of refugees’ right to work, as well as widespread administrative failures within the asylum system, provide another example. See South African Department of Home Affairs, ‘Green Paper on the International Migration’ (24 June 2016) 64 ff; Didier Fassin, Matthew Wilhelm-Solomon and Aurelia Segatti, ‘Asylum as a Form of Life: The Politics and Experience of Indeterminacy in South Africa’ (2017) 58(2) *Current Anthropology* 160.

⁷⁴ See generally Alexander Betts, Louise Bloom, Josiah Kaplan and Naohiko Omata, *Refugee Economies: Forced Displacement and Development* (Oxford University Press, 2016).

⁷⁵ In Uganda, refugee protection is now governed by the Refugee Act 2006 (Uganda) (entered into force in 2008) and Refugee Regulations 2010 (Uganda). See generally World Bank Group, ‘An Assessment of Uganda’s Progressive Approach to Refugee Management’ (May 2016).

have done so in the years since 1990.⁷⁶ The nature of refugee status determination in Africa is also changing. While UNHCR has historically taken a leading role in this area, refugee status determination procedures are now usually managed by national governments.⁷⁷ Moreover, outside situations of mass influx, refugee status is now generally determined on an individual, rather than a prima facie or group, basis.⁷⁸

In addition to changes within African states, international and regional actors are increasingly engaging with the expanded refugee definition, including exploring its potential application in new contexts and in situations not traditionally thought to give rise to refugee claims. In 2014-15, regional intergovernmental consultations by the Nansen Initiative on Disaster-Induced Cross-Border Displacement emphasised the potential for the definition to protect persons fleeing the effects of natural hazards, disasters and the negative effects of climate change.⁷⁹ In 2016, UNHCR's *Guidelines on Claims for Refugee Status in Situations of Armed Conflict and Violence* (UNHCR Armed Conflict Guidelines) included the organisation's first significant (albeit still brief) substantive analysis of the definition.⁸⁰ Most recently, the AU has declared 2019 the Year of Refugees, Returnees and IDPs.⁸¹ The 'Concept Note' for this theme states the AU's intention to develop 'an authoritative legal commentary on the [1969] Convention',⁸² including the expanded refugee definition.⁸³

⁷⁶ Of the 29 African states parties to the 1969 Convention that have incorporated the expanded refugee definition into their domestic legislation, only four (Lesotho, Malawi, Nigeria and Zimbabwe) did so prior to 1990.

⁷⁷ Sharpe, above n 38, 7. In some states, UNHCR is represented on decision-making committees with observer status only.

⁷⁸ *ibid.* The nature of prima facie, or group-based, refugee status determination procedures is outside the scope of this article. For an overview in the context of the expanded refugee definition, see Sharpe, above n 8, 65-70.

⁷⁹ See Nansen Initiative on Disaster Induced Cross-Border Displacement, 'Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change Protection' (December 2015) esp para 56; *Summary of Conclusions: Nansen Initiative: Nansen Initiative Greater Horn of Africa Regional Consultation, Nairobi, Kenya, 21-23 May 2014* (2014) conclusion 4(3); *Report for the Nansen Initiative Southern Africa Consultation, Stellenbosch, South Africa, 4-5 June 2015* (2015) Section 3.3. The definition's potential in this context was highlighted in a statement by Volker Türk, UNHCR Assistant High Commissioner for Protection, to Advisory Committee Workshop for the Platform on Disaster Displacement, Geneva, Switzerland (13 October 2016). Further investigation of this potential is included in the work plan of the Initiative's successor, the Platform on Disaster Displacement. Platform on Disaster Displacement, *Work Plan 2016-2019* (15 January 2017) <<http://disasterdisplacement.org/wp-content/uploads/2015/02/15012017-PDD-Workplan.pdf>> item 4.3.

⁸⁰ *UNHCR Armed Conflict Guidelines* part III.

⁸¹ AU Executive Council, 'Concept Note on the Theme of the Year: "Refugees, Returnees and Internally Displaced Persons: Towards Durable Solutions to Forced Displacement in Africa' (February 2019).

⁸² *ibid* 6.

⁸³ *ibid* 6-7.

The increasing ‘legalisation’ of African refugee protection and attention to the 1969 Convention could be a positive development for the implementation of Africa’s expanded refugee definition. It increases opportunities for capacity building among refugee status decision-makers in Africa and for enforcement of states’ refugee protection obligations. In 2014, the High Court of South Africa provided the continent’s first explicit judicial consideration of the definition’s terms and application⁸⁴ and held the refugee status decision-makers who fail to consider refugee claims under the definition’s terms commit an error of law reviewable by the courts.⁸⁵ In this environment, however, vague accolades and general statements regarding the definition’s expansive nature do not suffice.

The scope and meaning of the expanded refugee definition’s terms are not self-evident – they require interpretation. In addition to the issues identified above regarding the definition’s objective nature and suitability in situations of mass influx, a range of more specific interpretative questions arise. These include: does the expanded refugee definition apply only to refugees coming from within Africa, or also to those who arrive from elsewhere? What kinds of situations are encompassed by the definition’s four enumerated refugee-producing events – external aggression, occupation, foreign domination and events seriously disturbing public order? When is a person ‘compelled to leave’ his or her home? Is the definition limited to refugee scenarios of the type that existed at the time of its drafting, or can it evolve to meet new and emerging forms of displacement, such as that which occurs in the context of climate change?

In the context of increasing attention on the expanded refugee definition, and with the prospect of explicit guidance from the AU, it is now imperative that interpretive questions such as these be addressed in a more principled and legally justifiable manner than they have been so far. The source of the framework for a principled interpretation of the expanded refugee definition is clear – as a provision of a treaty, the definition must be interpreted in accordance with the international law principles of treaty interpretation, set out in Articles 31-33 of the VCLT. Precisely how these principles apply in the context of the definition, and their implications for its scope and meaning, may be less clear. These are the subject of the principled interpretative framework set out in the remainder of this article.

⁸⁴ *Radjabu v The Chairperson of the Standing Committee for Refugee Affairs* [2014] ZAWCHC 134.

⁸⁵ *Harerimana v. the Chairperson of the Refugee Appeal Board and Others* [2013] ZAWCHC 209.

4. A PRINCIPLED INTERPRETATIVE FRAMEWORK FOR THE EXPANDED REFUGEE DEFINITION

4.1. International law principles of treaty interpretation

International law principles of treaty interpretation are set out in Articles 31-33 of the VCLT. While the VCLT as a whole applies only to states parties to it, and to treaties concluded after the VCLT entered into force,⁸⁶ the principles of treaty interpretation set out in Articles 31-33 are well accepted to reflect pre-existing principles of customary international law.⁸⁷ This means that they apply irrespective of when a treaty was concluded⁸⁸ and whether a particular state party to the treaty is also party to the VCLT.⁸⁹ The principles expressed in the VCLT therefore apply to all states parties to the 1969 Convention in their interpretation of the expanded refugee definition.

The VCLT principles of interpretation apply, self-evidently, to treaties.⁹⁰ However, there are sound reasons for applying them in the definition's interpretation under domestic law as well. Although the VCLT does not deal with the domestic interpretation of treaty obligations specifically, it does require states to perform their treaty obligations in good faith,⁹¹ and provides that a state 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.⁹² Ensuring that the domestic interpretation of the expanded refugee definition accords with the VCLT principles of interpretation will promote states'

⁸⁶ VCLT, art 4.

⁸⁷ The International Court of Justice (ICJ) has proclaimed this in a number of cases. See, eg, *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (Judgment) [1994] ICJ Rep 6, 19. See generally Richard Gardiner, *Treaty Interpretation* (Oxford University Press, 2008) 142; Aust, above n 35, 83.

⁸⁸ The 1969 African was concluded on 10 September 1969, more than ten years before the VCLT entered into force on 27 January 1980.

⁸⁹ Only 24 of the 45 states parties to the 1969 Convention are also parties to the VCLT. A further four states parties have signed but not ratified the VCLT. For a full list of states parties to the VCLT see: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en.

⁹⁰ VCLT, art 2(1)(a), defines a treaty as an 'international agreement concluded between States in written form and governed by international law'.

⁹¹ VCLT, art 26.

⁹² VCLT, art 27. See also 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (2001) II Yearbook of the International Law Commission 31 (ILC Draft Articles) art 3.

compliance with these provisions, as well as with the 1969 Convention as a whole.⁹³ Moreover, if a state's domestic interpretation of the definition does *not* accord with its meaning under international law, this risks putting the state in breach of its obligations with respect to the recognition and protection of refugees as defined therein.⁹⁴ Interpreting the definition consistently under international and domestic law facilitates consistency in its interpretation among states parties to the 1969 Convention, which is a necessary first step in ensuring fairness and predictability in refugee status decision-making.⁹⁵

The limitations of international law principles of treaty interpretation are acknowledged: they are 'not a step-by-step formula for producing an irrebuttable interpretation in every case'.⁹⁶ A principled interpretation of the definition's terms might yield a range of reasonable and justifiable views regarding its scope and meaning. Nevertheless, the principles are not, as one commentator on the definition has asserted, 'so all embracing that the interpreter is left able to hang his hat nearly anywhere he will'.⁹⁷ Rather, they 'do indicate what is to be taken into account ... and, to some extent, how to approach this body of material'.⁹⁸ An interpretation of the definition that is *not* consistent with the principles is unacceptable as a matter of international law.

4.2. Four key principles of interpretation

While the source of the interpretative principles is clear, the principles themselves are not self-applying. Their scope and meaning, and their application to particular terms, inevitably raises further questions and debate. Practical constraints can also make the application of treaty interpretation principles challenging. For the most part, decision-makers in Africa are

⁹³ David Sloss, 'Applying Treaties in Domestic Law' in Duncan B. Hollis, *The Oxford Guide to Treaties* (Oxford University Press, 2012) 393.

⁹⁴ This would be particularly problematic if the domestic interpretation of the definition *narrowed* the category of 'refugee', thereby denying recognition and protection to persons so entitled under the 1969 Convention, and potentially putting their lives and security at risk. Arguably, no problem arises where the divergence of interpretation leads to an expansion of the category of refugee. The 1969 Convention imposes no obligation on states to *limit* refugee protection to refugees so defined.

⁹⁵ See Jason Pobjoy, *The Child in International Refugee Law* (Cambridge University Press, 2017) 33. Pobjoy notes that '[b]y contrast, there is a danger that relying on domestic principles statutory interpretation – which vary from state to state – may give rise to conflicting interpretations and the corresponding risk of fragmentation.'

⁹⁶ Gardiner, above n 87, 9.

⁹⁷ Micah Bond Rankin, 'Extending the Limits or Narrowing the Scope: Deconstructing the OAU Refugee Definition Thirty Years On' UNHCR New Issues in Refugee Research Working Paper No. 113 (2005) 12.

⁹⁸ Gardiner, above n 87, 9, 29.

expected to undertake refugee status determination with extremely limited time, resources and training, meaning that the capacity for detailed legal research and analysis is severely constrained.

Moreover, each of the VCLT's principles of interpretation is useful in the definition's interpretation only to the extent that it is relevant. Some are highly relevant, providing the core framework for selecting between multiple possible meanings of its respective terms. For example, the VCLT's Article 31(1) 'general rule of interpretation'⁹⁹ is the foundation of a principled interpretation and must be applied in the interpretation of *all* the definition's terms. Other interpretative principles, however, are not relevant at all. For example, Article 31(3)(a) of the VCLT provides that any 'subsequent agreement between the parties regarding the interpretation of the treaty' should be taken into account in interpretation;¹⁰⁰ however, to date there has been no such agreement in relation to the 1969 Convention.

This article therefore proposes four key principles for interpreting the expanded refugee definition. They are as follows: 1) the VCLT's Article 31(1) 'general rule' of interpretation, which requires that a treaty's terms be interpreted in context and in accordance with the treaty's object and purpose, provides the primary guide to interpretation and should not be undermined by supplementary means of interpretation, such as the use of preparatory materials or isolated examples of state practice; 2) the object and purpose of the 1969 Convention is the humanitarian protection of refugees, meaning that the definition should be interpreted as inclusively as possible and with an emphasis on the protection needs of refugees; 3) the definition should not be limited by its colonial origins but should be interpreted in an 'evolutionary' manner, in accordance with its modern day meaning and subsequent developments in international law; and 4) comparative treaty interpretation – the use of parallel interpretations of terms elsewhere in international law – may provide a guide to the interpretation of the definition's terms, so long as its use remains subject to the application of the interpretative principles as a whole.

These four key principles are not unique to the expanded refugee definition. They are fundamental principles of interpretation that apply to *all* treaties. Some of them – including

⁹⁹ VCLT, art 31(1).

¹⁰⁰ VCLT, art 31(3)(a).

the need for an ‘evolutionary’ approach to interpretation and the qualified role of comparative treaty interpretation – have been articulated and applied in similar ways to the universal refugee definition, as well as to other instruments of international law (particularly international human rights law). However, in the interpretation of the expanded refugee definition, the four key principles set out below are the most important, and the key to addressing shortcomings in existing understandings and interpretations.

Each of the four key principles of interpretation is set out and discussed in turn below. While a brief overview of the source and substance of each principle is provided, a detailed discussion of the requirements of the VCLT is outside the scope of this article.¹⁰¹ Instead, the focus of the analysis below is on setting out why each of the four key principles is so important in the definition’s interpretation, and articulating its implications for the interpretation of the definition and the meaning of its terms.

4.2.1. Key principle 1: The ‘general rule of interpretation’ is the primary guide to interpreting the expanded refugee definition

Key principle 1 for interpreting the expanded refugee definition is that the ‘general rule of interpretation’ set out in Article 31(1) of the VCLT provides the primary guide to interpreting definition’s terms. The general rule of interpretation states:

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.¹⁰²

The general rule of interpretation comprises four main components – good faith, ordinary meaning, context, and object and purpose. In doing so, it combines two historically dominant, and often contrasted, approaches to interpretation – the literal (ordinary meaning) and teleological (object and purpose) approaches – making it clear that neither is primary and both are to be applied together.¹⁰³ Indeed, the holistic nature of the general rule is its most

¹⁰¹ For a comprehensive analysis of international law on treaty interpretation see, eg, Gardiner, above n 87; Aust, above n 35, Ch 3; Ian Brownlie, *Principles of Public International Law* (OUP, 7th ed, 2008) Ch 16.

¹⁰² VCLT, art 31(1).

¹⁰³ Aust, above n 35, 83; Gardiner, above n 87, 8.

important feature. For while the ‘ordinary meaning’ of the definition’s terms may have intuitive appeal as the starting point for interpretation,¹⁰⁴ the use of the singular in Article 31 – titled the general *rule* of interpretation – confirms that its respective components should be applied in a ‘single combined operation’.¹⁰⁵ Importantly, this means that the terms of the expanded refugee definition do not have a ‘standalone’ ordinary meaning.¹⁰⁶ Rather, their ordinary meaning can *only* be determined in light of their context in the definition, and the object and purpose of the 1969 Convention as a whole.¹⁰⁷ The holistic nature of the general rule of interpretation has been important in the interpretation of the universal refugee definition, where courts and scholars alike have cautioned against simplistic understandings of ‘ordinary meaning’ and used the definition’s context and the 1951 Convention’s object and purpose to support particular readings of its criteria for refugee status.¹⁰⁸

A disregard for the general rule of interpretation is the key problem with existing understandings of the expanded refugee definition in both literature and practice. For example, claims by commentators that the definition cannot be interpreted due to the lack of available drafting materials for the 1969 Convention,¹⁰⁹ or that parts of the definition have become redundant with the demise of colonial rule in Africa,¹¹⁰ fail to recognise the primacy that the general rule of interpretation gives to the text of the treaty itself. The same may be said of existing analyses of the definition’s terms that rely, for example, on isolated examples of African state practice, and parallel interpretations of the definition’s terms from elsewhere in international law, as a ‘short cut’ to understanding their meaning in the definition.¹¹¹

Clearly, the general rule of interpretation does not *prohibit* recourse to these other interpretative strategies, many of which are provided for elsewhere in the VCLT itself.¹¹² In

¹⁰⁴ Gardiner, above n 87, 162.

¹⁰⁵ Brownlie, above n 101, 632. See also Gardiner, above n 87, 141-2; Aust, above n 35, 186.

¹⁰⁶ In the refugee law context, the very notion of ‘ordinary meaning’ has been criticised. See James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005) 49 ff.

¹⁰⁷ ILC Draft Articles, 221; Gardiner, above n 87, 162; Aust, above n 35, 188.

¹⁰⁸ For example, the 1951 Convention’s extensive regime of refugee rights and its preambular references to the Universal Declaration on Human Rights have been used to support a human rights-based understanding of its criteria for refugee status. See eg Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge University Press, 2007) Ch 2.

¹⁰⁹ See Okoth-Obbo, above n 4, 86; Murray, above n 47, 187.

¹¹⁰ See Sharpe, above n 7, 113. Though cf. Sharpe, above n 8, 43 ff.

¹¹¹ The use of parallel interpretations of terms elsewhere in international law in the definition’s interpretation is discussed in more detail in section 4.2.4, below.

¹¹² VCLT, arts 31(3)(b) (state practice), 31(3)(c) (other areas of international law), 32 (preparatory work of the treaty).

some circumstances, the general rule may even lend them further support. For example, where a term has been interpreted similarly across a range of other international law instruments, this may suggest consistency in its ‘ordinary meaning’ across diverging contexts and objects and purposes. In other cases, however, the general rule of interpretation provides an important limitation on the use of interpretative strategies and guidance from elsewhere, which may produce a result that is inconsistent with the definition’s text.

This has important implications for the interpretation and meaning of the terms of the expanded refugee definition. For example, some commentators have pointed to a lack of support by African states to argue that the definition excludes people forced to flee so-called ‘natural’ disasters.¹¹³ However, such a position is not supported by the definition’s text – in particular, the inclusion of ‘events seriously disturbing public order’, which draws no distinction between human and ‘natural’ events. While state practice *is* a legitimate source of guidance in the interpretation of treaties, the limited available examples of state practice on this issue are not consistent – for example, South Africa has stated its opposition to including as refugees persons fleeing environmental forms of harm,¹¹⁴ while Ethiopia and Kenya have both shown support for their inclusion.¹¹⁵ They are also not sufficiently widespread to establish ‘the agreement of the parties regarding its interpretation’, as required under the VCLT.¹¹⁶ The apparent lack of state support for including as refugees people fleeing natural hazards and disasters must therefore not override a principled interpretation of the text of the definition itself.

The general rule of interpretation is particularly important when weighing up the value of ‘comparative treaty interpretation’ in the definition’s interpretation. For example, several of the definition’s enumerated refugee-producing events – external aggression, occupation and events seriously disturbing public order – include terms well known in other areas of law, such as IHL. Some of these terms carry remarkable consistency elsewhere in international

¹¹³ See Edwards, above n 43, 227.

¹¹⁴ Republic of South Africa, *Draft Refugee White Paper*, Government Gazette General Notice 1122 (1998) 7. See also Republic of South Africa, *Green Paper on the International Migration*, Government Gazette Notice No. 738 (2016) 5.

¹¹⁵ See Wood, above n 44, 25; *Statement by H. E. Mr Negash Kebret Botora, Ambassador Extraordinary and Plenipotentiary, Permanent Representative of the Federal Democratic Republic of Ethiopia to the United Nations Office in Geneva and to other International Organizations in Switzerland at the Nansen Initiative Global Consultation* (12 October 2015) 3, cited The Nansen Initiative, *Global Consultation Conference Report* (12-13 October 2015) 107.

¹¹⁶ VCLT, art 31(3)(b). See Sharpe, above n 8, 39.

law. The meaning of ‘occupation’, for example – that a ‘[t]erritory is considered occupied when it is actually placed under the authority of the hostile army’¹¹⁷ – has remained consistent over time and within changing contexts.¹¹⁸ Other terms have meanings that vary depending on where they are found. For example, while the UN General Assembly’s Resolution 3314 on the meaning of ‘aggression’ under the UN Charter excludes acts by non-state actors,¹¹⁹ elsewhere, including under African regional peace and security instruments, aggression includes a wider range of acts by non-state actors and foreign entities.¹²⁰ Which of these ‘ordinary meanings’ is more appropriate under the expanded refugee definition will depend on the context of the definition and the object and purpose of the 1969 Convention as a whole. These factors are considered further below.¹²¹

In sum, the general rule of interpretation provides the primary means of ascertaining the scope and meaning of the terms of the expanded refugee definition. The use of interpretive strategies and guidance *other* than the general rule of interpretation remains secondary, and subject, to the requirement that the definition be given its ordinary meaning, determined in light of its context and the 1969 Convention’s object and purpose.

4.2.2. Key principle 2: The definition should be interpreted in accordance with the 1969 Convention’s humanitarian object and purpose

Key principle 2 for interpreting the expanded refugee definition is directly connected to key principle 1. As noted above, one of the core components of the general rule of interpretation is the requirement to interpret a treaty’s terms in light of the object and purpose of the treaty

¹¹⁷ Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (opened for signature 18 October 1907, entered into force 26 January 1910) art 42. See also Common Article 2 of the 1949 Geneva Conventions; International Committee of the Red Cross, *Commentary on Convention (IV) relative to the Protection of Civilian Persons in Time of War* (1958), especially commentary on ‘Article 2: Application of the Convention’.

¹¹⁸ Though the scope of the powers and obligations that *apply* to the occupying power during occupation have been developed and clarified over time, the core meaning of occupation itself has not changed. It has also been held to reflect customary international law. *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168, 230; *Central Front – Eritrea’s Claims 2, 4, 6, 7, 8 & 22 (Eritrea v Ethiopia)* (Partial Award), Eritrea Ethiopia Claims Commission (28 April 2004) para 22.

¹¹⁹ Definition of Aggression (14 December 1974) UNGA Res 3314, art 1; Rome Statute of the International Criminal Court (opened for signature 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, art 8bis.

¹²⁰ See African Union Non-Aggression and Common Defence Pact (opened for signature 31 January 2005, entered into force 18 December 2009) art 1(c).

¹²¹ See below, section 4.2.2.

as a whole.¹²² This component of the general rule invites further consideration because, unlike some of the general rule's other components, such as ordinary meaning and context, which will differ with respect to a treaty's individual terms and provisions, the object and purpose of the treaty remains consistent across the treaty as a whole.¹²³ The object and purpose component of the general rule is particularly important in the interpretation of treaties such as the 1969 Convention, that are concerned with the rights and interests of individuals, because it helps to ensure that the interests of the state do not override those of the treaty's intended beneficiaries.¹²⁴

Establishing an accurate understanding of the object and purpose of the 1969 Convention is therefore particularly important to the interpretation of the expanded refugee definition, despite the fact that there is some disagreement on this question in existing refugee law literature. While some commentators assert that the treaty is 'a humanitarian and protection oriented document',¹²⁵ others argue that its chief concerns are the protection of state security and promotion of harmonious relations between states¹²⁶ and that it 'is not strongly linked to a human rights perception of the refugee problem'.¹²⁷

The view presented here is that the object and purpose of the 1969 Convention is the humanitarian protection of refugees. Several aspects of the treaty's text support this view. The preamble to the 1969 Convention expresses the desire of states parties to provide refugees 'with a better life and future',¹²⁸ acknowledges 'the principle that human beings shall enjoy fundamental rights and freedoms without discrimination',¹²⁹ and recognises 'the

¹²² VCLT, art 31(1).

¹²³ See Jan Klabbers, 'Some Problems Regarding the Object and Purpose of Treaties' (1997) 8 *Finnish Yearbook of International Law* 138, 151-2. Klabbers emphasises that the reference to 'object and purpose' in Article 31(1) is to the object and purpose of the treaty as a whole, not to its individual provisions or sections.

¹²⁴ See Sir Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of *non-refoulement*: Opinion' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003) 104; See generally Guy S. Goodwin-Gill, 'The Search for the One, True Meaning...' in Guy S. Goodwin-Gill and Hélène Lambert (eds), *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (Cambridge University Press, 2010) 216-7.

¹²⁵ Rankin, above n 97, 12. See also Sharpe, above n 8, 41-2; Sharpe, above n 7, 99; Edwards, above n 43, 228.

¹²⁶ Van Garderen & Ebenstein, above n 14, 188.

¹²⁷ Joe 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(3) *Denver Journal of International Law and Policy* 349, 375; see also Murray, above n 47, 189.

¹²⁸ 1969 Convention, preambular para 1.

¹²⁹ *ibid*, preambular para 6.

need for an *essentially humanitarian approach* towards solving the problems of refugees'.¹³⁰ Its substantive provisions include the principle of asylum,¹³¹ a prohibition on discrimination,¹³² the principle of voluntary repatriation¹³³ and the right to travel documents.¹³⁴ While these do not match the comprehensive list of rights found in the 1951 Convention, they are nevertheless clearly concerned with protecting refugees.¹³⁵ Finally, the status of the 1969 Convention as 'complementary to' the 1951 Convention is also relevant, as the humanitarian character of the latter has been near-universally accepted.¹³⁶

It is true that other aspects of the 1969 Convention are concerned less with the protection of refugees and more with the security interests of states. The preamble describes the refugee problem as 'a source of friction among states'¹³⁷ and notes the need to discourage 'subversive elements' of the refugee population.¹³⁸ Its provisions include an obligation on refugees to 'abstain from any subversive activities against any Member State of the OAU',¹³⁹ and on states to 'prohibit refugees residing in their respective territories from attacking any State Member of the OAU'.¹⁴⁰ However, these features do not alter the 1969 Convention's fundamentally humanitarian character.

As has been noted in relation to the 1951 Convention, the desire of states to solve a problem of mutual concern does not undermine a treaty's overarching humanitarian purpose.¹⁴¹ This is true for the 1969 Convention, where states' concern with preventing subversive activities and friction among states were 'all part of the architecture of predictability, depoliticization,

¹³⁰ *ibid*, preambular para 2 (emphasis added).

¹³¹ *ibid*, art II.

¹³² *ibid*, art IV.

¹³³ *ibid*, art V.

¹³⁴ *ibid*, art VI.

¹³⁵ It could also be argued that the complementary nature of the 1951 and 1969 Conventions makes it unnecessary for the 1969 Convention to replicate the 1951 Convention's comprehensive set of rights, as refugees qualifying under both the universal and expanded refugee definitions should be afforded the rights set out in the 1951 Convention itself. See above n 28.

¹³⁶ See generally Lauterpacht and Bethlehem, above n 124, 99-100; Jane Mcadam, 'Interpretation of the Refugee Convention' in Andreas Zimmerman (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011) 91-3; Foster, above n 108, 45-6; James C. Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd edn, 2014) 10-11.

¹³⁷ 1969 Convention, preambular para 3.

¹³⁸ *ibid*, preambular paras 4 and 5.

¹³⁹ *ibid*, art III(1).

¹⁴⁰ *ibid*, art III(2).

¹⁴¹ Foster, above n 108, 43-5. Foster notes that '[w]hile it is true that states were motivated to formulate an international refugee regime by the need to deal with a difficult problem of mutual concern, that "problem" was conceived in humanitarian terms.' See also Jeff Crisp, 'Africa's refugees: patterns, problems and policy challenges' (August 2000) UNHCR New Issues in Refugee Research Working Paper No. 28, 12.

humanitarianization and coherence that the [1969] Convention was striving to construct'.¹⁴² This harmony of purpose is most clear in Article II(2) of the 1969 Convention, which states that '[t]he grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State'.¹⁴³ The valid need for states to protect their own interests in the context of refugee protection has been noted more generally, as '[p]rotection works best when it is congruent with other policy goals... such as bolstering national security'.¹⁴⁴ In this light, the 1969 Convention's recognition of the security dimensions of refugee protection could be seen to strengthen, rather than undermine, its humanitarian aims.

The humanitarian object and purpose of the 1969 Convention is a key consideration in the application of the general rule of interpretation discussed above and means that the expanded refugee definition must be interpreted in a way that promotes the humanitarian protection of refugees. This has three specific implications for the definition's interpretation.

First, as the function of the definition is to *provide* (rather than to withhold) protection, it should be interpreted as inclusively as possible. In choosing between multiple potential meanings of the definition's terms, a broad construction should generally be preferred to a narrow one.¹⁴⁵ This reflects the approach taken to the interpretation of the universal refugee definition, where the humanitarian object and purpose of the 1951 Convention has been held to mean that a 'broad approach [to interpretation] is what is needed, rather than a narrow linguistic approach'.¹⁴⁶ For example, while it has been suggested that the expanded refugee definition's protection of 'every person' could be limited to persons fleeing from other African states,¹⁴⁷ a more inclusive reading, that includes, for example, significant numbers of

¹⁴² Okoth-Obbo, above n 4, 90 (emphasis added).

¹⁴³ 1969 Convention, art II(2).

¹⁴⁴ Kate Jastram, 'Regional refugee protection in comparative perspective: Lessons learned from the Asia-Pacific, the Americas, Africa, and Europe' (November 2015) Andrew and Renata Kaldor Centre for International Refugee Law Policy Brief 2, 3.

¹⁴⁵ Subject, of course, to the application of the other components of the general rule.

¹⁴⁶ *R v SSHD; Ex Parte Adan and Others* [1999] 1 AC 293, 305. See also *R v Asfaw* [2008] UKHL 31, para 55 (Lord Bingham).

¹⁴⁷ See Rankin, above n 1, 415.

Syrians and Yemenis seeking protection in Africa,¹⁴⁸ would far better promote the 1969 Convention's humanitarian protection objectives.¹⁴⁹

Second, the humanitarian object and purpose of the 1969 Convention means that the interpretation of the definition's terms should focus on criteria relevant to refugees' need for such protection. This principle is perhaps better stated in the reverse – that is, considerations that are *not* relevant to a refugee's protection needs should *not* be imported into the definition's terms. Like the general rule as a whole, this is particularly important when drawing on parallel interpretations of the definition's terms from elsewhere in international law, as differences between the respective objects and purposes of different treaties may warrant different constructions of the same term in each. For example, as noted above, the meaning of 'aggression' elsewhere in international law incorporates considerations relating to the identity of the aggressor.¹⁵⁰ Such considerations are clearly relevant to the accountability of perpetrators of aggression, but may be irrelevant to the protection needs of those who have fled.¹⁵¹

Finally, the humanitarian object and purpose of the 1969 Convention supports an 'evolutionary' approach to its interpretation, meaning that the definition should be interpreted in light of current circumstances and subsequent developments in international law. This is key principle 3 for definition's interpretation.

4.2.3. Key principle 3: The definition should be interpreted in an evolutionary manner, in accordance with its current context and subsequent developments in international law

The need for treaties like the 1969 Convention to be interpreted and applied over time raises the question how to ensure that they remain effective within changing social, political and legal environments. This is an important question for the interpretation of the expanded refugee definition, as the key drivers of displacement have changed from colonial and

¹⁴⁸ For example, as at 31 October 2017, UNHCR reported that a total of 99,472 Yemeni nationals had fled Yemen to Djibouti, Somalia, Ethiopia and Sudan. See UNHCR, 'Yemen: Regional Refugee and Migrant Response Plan' (31 October 2017) <<http://data.unhcr.org/yemen/regional.php>>.

¹⁴⁹ See also Sharpe, above n 8, 42-3.

¹⁵⁰ For example, whether the putative aggressor is a state or non-state actor.

¹⁵¹ Indeed, acts of aggression by non-state actors may impose an even greater risk to the population.

minority rule (at the time of the 1969 Convention's adoption) to now intra-state conflict, political instability, and, increasingly, natural hazards, disasters and the effects of climate change. One means of ensuring a treaty's ongoing effectiveness in a changing environment is via an 'evolutionary' approach to its interpretation. Evolutionary interpretation rejects the quest for 'originalism',¹⁵² or the idea that a treaty's meaning remains static at the time of its drafting, and mandates instead that a treaty be interpreted in light of the context in which it now applies.¹⁵³

Evolutionary interpretation is also sometimes described as 'dynamic', 'living instrument', or 'evolutive' interpretation.¹⁵⁴ However, these designations should not be taken to imply that an evolutionary approach involves a departure from the VCLT principles of treaty interpretation. Rather, it results from the application of the VCLT principles themselves, including the Article 31(1) general rule of interpretation.¹⁵⁵ That is, where the treaty 'evinces an intention' that it be interpreted in an evolving manner,¹⁵⁶ an evolutionary interpretation results simply from interpreting the treaty's terms in context, as required by the general rule of interpretation. An evolutionary approach may also be warranted in light of a treaty's object and purpose. This is important in the interpretation of humanitarian instruments, where a *failure* to take into account evolving understandings of human rights and humanitarian standards could undermine the treaty, making it an 'anachronism' or an 'impediment to the achievement of its own aims'.¹⁵⁷

¹⁵² George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2007) 59.

¹⁵³ Evolutionary interpretation has sometimes been seen as overlapping with the principle of 'effectiveness' in interpretation. See generally, Michael Waibel, 'Demystifying the Art of Interpretation' (2011) 22(2) *The European Journal of International Law* 571, 581-3.

¹⁵⁴ The ILC uses the term 'evolutive' interpretation, while the European Court of Human Rights has favoured the 'living instrument' approach. See generally, *Report of the International Law Commission, Sixty-fifth session* (New York, 2013) 24 (ILC Report); Letsas, above n 152, 65.

¹⁵⁵ See generally ILC Report, above n 154, 27; Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford University Press, 2014) 2.

¹⁵⁶ Foster, above n 108, 61. The relevant 'intention' here is not that of the treaty's drafters, which is often sought in the treaty's drafting materials. Rather, it is the 'objectivised intention', evinced by the treaty itself through its preamble and its substantive provisions. See Bjorge, above n 155, 2ff. The ILC refers to the 'presumed intention of the parties'. ILC Report, above n 154, 27.

¹⁵⁷ *R v Immigration Appeal Tribunal, Ex Parte Shah* [1997] Imm AR 145, 152 (Sedley J). See generally Letsas, above n 152, Ch 3; McAdam, above n 136, 103; Goodwin-Gill, above n 124, 220. This approach has also been taken by the Inter-American Court of Human Rights and the UN Human Rights Committee. See Foster, above n 108, 62.

The threshold for establishing an evolutionary interpretation is not high.¹⁵⁸ Under the 1951 Convention, the use of open-ended terms such as ‘being persecuted’, and the intention to ‘afford continuing protection for refugees in the changing circumstances of the present and future world’,¹⁵⁹ have been found to support an evolutionary interpretation of the universal refugee definition.¹⁶⁰ Similar considerations support an evolutionary interpretation of the 1969 Convention. Like the 1951 Convention, the 1969 Convention extends refugee protection not only to those who were already refugees at the time of its adoption, but also to those displaced into the future. The expanded refugee definition contains no temporal limitations and many of its key terms, including the four enumerated refugee-producing events, are broad and undefined.¹⁶¹ Finally, as noted above, if the meaning of the definition was limited to the socio-political context in which it was drafted, its capacity to achieve its aims – protecting refugees and providing them with ‘a better life and future’¹⁶² – would be severely, if not entirely, undone.

An evolutionary approach is particularly important in the interpretation of those terms of the expanded refugee definition that most clearly reflect its origins in the fight against colonial rule. For example, it has been suggested that some of the definition’s components – notably its inclusion of persons fleeing external aggression, occupation and foreign domination – have ‘largely ceased to be relevant’ in post-colonial Africa.¹⁶³ However, such terms should not be limited to the colonial context in which they were drafted, but should accord with their modern-day meaning and subsequent developments in international law. While the origins of the 1969 Convention in the struggle against colonial rule are not *irrelevant* in the definition’s interpretation – reference to a treaty’s ‘circumstances of conclusion’ is a legitimate means of interpretation under the VCLT¹⁶⁴ – they provide a secondary source of guidance only,¹⁶⁵ and

¹⁵⁸ According to the ICJ, where a treaty uses ‘generic terms’ and is ‘of continuing duration’, these evidence the intention that its meaning should evolve. *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (Judgment) [2009] ICJ Rep 213, 243.

¹⁵⁹ *R v SSHD; ex parte Adan and Others* [2001] 2 AC 477, 500 (Laws LJ).

¹⁶⁰ See generally Foster, above n 108, 62; Goodwin-Gill, above n 124, 231.

¹⁶¹ According to Rankin, ‘[l]ike the 1951 Convention, the [1969] Convention ... may have intentionally been left vague in order to capture myriad unforeseen circumstances’ Rankin, above n 1, 418.

¹⁶² 1969 Convention, preambular para 1.

¹⁶³ Sharpe, above n 7, 113.

¹⁶⁴ VCLT, Art 32.

¹⁶⁵ Article 32 of the VCLT is titled ‘*supplementary* means of interpretation’ (emphasis added).

not the primary guide to its meaning. They must not displace or override the application of the general rule of interpretation, nor the current meaning of the definition's terms.¹⁶⁶

Taking an evolutionary approach to the interpretation of the expanded refugee definition, terms such as aggression and occupation could be applied to a number of more recent situations on the continent, including Kenya's 2012 incursion into Somalia, the presence of Rwandan forces in the DRC, border disputes between North and South Sudan, and Morocco's occupation in Western Sahara. Indeed, in 1981, following the end of colonial rule in Africa, the UN General Assembly recognised that 'aggression', 'alien domination' and 'occupation' remained among the root causes of refugee flows throughout the world.¹⁶⁷

Like the general rule of interpretation, an evolutionary approach to interpreting the expanded refugee definition also has implications for the use of other areas of international law in the interpretation of its terms. This is addressed in key principle 4.

4.2.4. Key principle 4: Comparative treaty interpretation – the use of parallel interpretations of the definition's terms from elsewhere in international law – remains subject to the application of the VCLT principles as a whole

Key principle 4 for interpreting the expanded refugee definition relates to the use of parallel interpretations of the definition's terms in other instruments and areas of international law as a guide to the interpretation of the same terms in the definition. As noted already, existing analyses of the expanded refugee definition rely heavily on the interpretation of terms such as 'aggression' and 'occupation' from elsewhere in international law. This interpretative strategy is sometimes described as 'comparative treaty interpretation'¹⁶⁸ or 'cross-

¹⁶⁶ It is worth emphasising that the circumstances surrounding the conclusion of the 1969 Convention are not part of the 'context' under the general rule of interpretation, which refers rather to the internal context of the treaty – that is, the surrounding terms, sentences and provisions. See generally Gardiner, above n 87, 177-189.

¹⁶⁷ *International Cooperation to Avert New Flows of Refugees*, GA Res 36/148, UN GAOR, UN Doc. A/RES/36/148 (16 December 1981).

¹⁶⁸ Foster, above n 108, 52.

fertilisation’ in international law.¹⁶⁹ It has garnered particular attention in broader discussions regarding ‘systemic integration’ in international law.¹⁷⁰

In the absence of other guidance, interpretations of many of the definition’s terms – including aggression, occupation, public order, compelled and habitual residence – from other areas of international law have become one of the primary means of understanding them.¹⁷¹

According to Edwards, as ‘[n]one of the terms incorporated within [the definition] have been defined within the [1969] Convention itself ... recourse to other international instruments is the logical starting point as a basis for understanding them’.¹⁷² The close relationship between international refugee law and other areas of international law – most notably, international human rights law – has supported considerable advances in the scope of refugee protection under the 1951 Convention in the years since it was adopted.¹⁷³ However, an overreliance on comparative treaty interpretation fails to recognise the qualified role that it should play in a principled interpretation of the definition.

Under the VCLT, comparative treaty interpretation is dealt with most explicitly in Article 31(3)(c), which provides:

There shall be taken into account, together with the context ... any relevant rules of international law applicable in the relations between the parties.¹⁷⁴

¹⁶⁹ Stephen Jacquemet, ‘The cross-fertilization of international humanitarian law and international refugee law’ (2001) 83 *International Review of the Red Cross* 651; Philippe Sands, ‘Treaty, Custom and the Cross-fertilization of International Law (1998) 1(1) *Yale Human Rights and Development Journal* 85.

¹⁷⁰ See especially Martti Koskeniemi, ‘Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law’ (13 April 2006) Report of the Study Group of the International Law Commission, 214 (ILC Fragmentation Report) 208. The ILC Fragmentation Report defines ‘systemic integration’ as the process whereby ‘international obligations are interpreted by reference to their normative environment (“system”).’ See also *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* [2003] ICJ Rep 161, esp para 41; Sands, above n 169, 89, 95; Campbell McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 54 *International and Comparative Law Quarterly* 279, 280. See also Sharpe, above n 8, 40.

¹⁷¹ This is the main interpretative tool of both Rankin, above n 1, and Edwards, above n 43.

¹⁷² Edwards, above n 43, 212.

¹⁷³ The human rights-based approach is now the dominant approach to interpreting the expanded refugee definition and has strengthened the scope of protection for particular groups of refugees, such as persons at risk of socio-economic harms and children. See respectively Foster, above n 108; Pobjoy, above n 95. See generally Bruce Burson and David James Cantor, ‘Introduction: Interpreting the Refugee Definition via Human Rights Standards’ in Bruce Burson and David James Cantor (eds), *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (Brill Nijhoff, 2016).

¹⁷⁴ VCLT, art 31(3)(c).

The language of Article 31(3)(c) is mandatory: relevant rules of international law *shall* be taken into account in interpretation.¹⁷⁵ Relevant rules of international law include ‘all the sources of international law, including custom, general principles, and, where applicable, other treaties’.¹⁷⁶ They may also include judicial decisions and soft law sources where these shed light on the meaning of the binding international law rules themselves.¹⁷⁷ To be considered under Article 31(3)(c), however, the rules must be ‘applicable in the relations between the parties’. While there has been some disagreement on what this requires, suggestions that it requires all parties to the treaty being interpreted also to be parties to any treaty invoked in interpretation have been largely rejected as unnecessarily restrictive, particularly in the context of large multilateral treaties, like the 1969 Convention.¹⁷⁸ Instead, the focus should be on whether the relevant rule has been ‘implicitly accepted’ or reflects the common understanding or intention of the parties to the treaty under interpretation.¹⁷⁹

Article 31(3)(c) of the VCLT does not provide an exhaustive statement as to when comparative treaty interpretation is permitted, however.¹⁸⁰ Other instruments of international law might also provide interpretative guidance where they have been incorporated directly into the treaty itself,¹⁸¹ reflect the ordinary meaning of the treaty’s terms,¹⁸² are part of the

¹⁷⁵ See Martti Koskenniemi, ‘Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law’ (13 April 2006) Report of the Study Group of the International Law Commission, 214 (ILC Fragmentation Report).

¹⁷⁶ *ibid* 215. See also *European Communities-Measures Affecting the Approval and Marketing of Biotech Products* (Panel Report) (29 September 2006) WTO Doc. WT/DS291, para 7.67.

¹⁷⁷ Foster, above n 108, 71.

¹⁷⁸ See ILC Fragmentation Report, above n 175, 237-8. Suggestions that ‘the parties’ in Article 31(3)(c) be limited to parties to a particular interpretative dispute have also been rejected for the potential to yield differing interpretations of the same treaty depending on which states are disputing. See Foster, above n 108, 56.

¹⁷⁹ This approach has been supported by the ILC, which has endorsed the use of other treaties in interpretation where they ‘provide evidence of the common understanding of the parties as to the object and purpose of the treaty under interpretation or as to the meaning of a particular term’. ILC Fragmentation Report, above n 175, 239. Sharpe supports this approach with respect to the expanded refugee definition. See Sharpe, above n 8, 41. It has also been applied in the refugee law context, including in seminal treatises on the scope of the universal refugee definition. See, eg, Foster, above n 108, 56, 64-5; Pobjoy, above n 95, 1.4.4.4; Hathaway and Foster, above n 136, 205.

¹⁸⁰ See generally Gardiner, above n 87, 271; McLachlan, above n 170, 291; Anne van Aaken, ‘Defragmentation of Public International Law Through Interpretation: A Methodological Proposal’ (2009) 16(2) *Indiana Journal of Global Legal Studies* 483, 495-6. Cf. Sands, above n 169, 87.

¹⁸¹ See, eg, 1969 Convention, art I(5)(a), which provides: ‘The provisions of this Convention shall not apply to any person with respect to whom the country of asylum has serious reasons for considering that ... he has committed a crime against peace, a war crime, or a crime against humanity, *as defined in the international instruments drawn up to make provision in respect of such crimes*’ (emphasis added).

¹⁸² VCLT, art 31(1). See van Aaken, above n 180, 495; Gardiner, above n 87, 282.

context,¹⁸³ share the same object and purpose,¹⁸⁴ or reflect the common understanding of the parties as to the meaning of certain terms.¹⁸⁵

The scope of international law instruments that may be consulted as part of comparative treaty interpretation is therefore wide. The more important question, however, concerns the use to which interpretative guidance from such instruments may be put. While systemic integration represents a laudable goal in international law, integration for its own sake is not a goal of interpretation. There is no presumption that the meaning of a term in one instrument will be the same as in another. As noted above, even the ‘ordinary meaning’ of a term can only be determined in its context and in light of the object and purpose of the treaty in which it appears.

Refugee law scholars have recognised the limits of comparative interpretation, emphasising differences in the objectives of different areas of law and pointing out that, in the interpretation of refugee law, the ‘complementarities and differences of ... bodies of international law must be taken into account’.¹⁸⁶ The need for a more nuanced approach to comparative treaty interpretation has also been recognised in refugee law in practice. For example, international criminal law (ICL) understandings of ‘persecution’ have been largely rejected in the interpretation of the universal refugee definition for their potential to introduce burdensome evidentiary hurdles, relating to the intent and responsibility of the persecutor, that do not bear on an individual’s need for protection.¹⁸⁷ Similarly, IHL understandings of

¹⁸³ VCLT, art 31(1). This approach has been taken to the interpretation of the 1951 Convention, where the preambular reference to the Universal Declaration of Human Rights and affirmation of ‘the principle that human beings shall enjoy fundamental rights and freedoms without discrimination’ have been said to make international human rights law part of the treaty’s context and invoked to support the use of human rights instruments in the interpretation of its refugee definition. See, eg, Foster, above n 108, 49-51.

¹⁸⁴ VCLT, art 31(1).

¹⁸⁵ See McLachlan, above n 170, 283-4.

¹⁸⁶ Vanessa Holzer, *The 1951 Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence*, UNHCR Legal and Protection Policy Research Series, PPLA/2012/05 (2012) 21. Holzer makes this point regarding the relationship between international refugee law and international criminal law. See generally David Cantor and Jean-François Durieux (eds), *Refugee from Inhumanity: War Refugees and International Humanitarian Law* (Brill, 2014); Alice Edwards, ‘Crossing Legal Borders: The Interface Between Refugee Law, Human Rights Law and Humanitarian Law in the International Protection of Refugees’ in Roberta Arnold and Noëlle Quéniévet, *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Martinus Nijhoff, 2008); Jean-François Durieux, ‘Of War, Flows, Laws and Flaws: A Reply to Hugo Storey’ (2012) 31(3) *Refugee Survey Quarterly* 161. Cf. Hugo Storey, ‘Armed Conflict in Asylum Law: The “War-Flaw”’ (2012) 31(2) *Refugee Survey Quarterly* 1.

¹⁸⁷ See generally Hathaway and Foster, above n 136, 192-3. See also Jane McAdam, ‘Individual risk, armed conflict and the standard of proof in complementary protection claims: the European Union and Canada compared’ in James Simeon (ed), *Critical Issues in International Refugee Law: Strategies toward Interpretative Harmony* (Cambridge University Press, 2010).

‘armed conflict’ have been rejected in the interpretation of the same term under Europe’s subsidiary protection regime.¹⁸⁸

This does not mean that comparative treaty interpretation has no value at all – indeed, it remains an integral part of a principled interpretation of the expanded refugee definition. Many of the other international law instruments in which the expanded refugee definition’s terms appear have been widely ratified by African states, and the 1969 Convention itself includes explicit references to numerous other international law instruments.¹⁸⁹ Some of these instruments will have more probative value than others. For example, African regional law instruments, drafted with the African context in mind and with a more closely overlapping set of states parties with the 1969 Convention, are likely to be more ‘relevant’ and ‘applicable’ (pursuant to VCLT, Article 31(3)(c)) in the definition’s interpretation than their international counterparts. This is important, for example, in the interpretation of ‘aggression’, where the approach of African regional instruments is generally more inclusive than that of international instruments.¹⁹⁰

The importance of a nuanced approach to comparative treaty interpretation can be seen particularly in interpretation of the fourth of the definition’s enumerated refugee-producing events – ‘events seriously disturbing public order’. This is arguably the expanded refugee definition’s most contentious component,¹⁹¹ owing to its potential breadth, and concerns that

¹⁸⁸ See *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)* [2011] L 337/9, art 15(c). CJEU, Case C-285/12, *Aboubacar Diakité v commissaire général aux réfugiés et aux apatrides*, 2014, paras 27, 23; CJEU, Case C-465/07, *Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie*, 2009; Violeta Moreno-Lax, ‘Of Autonomy, Autarky, Purposiveness and Fragmentation: The Relationship between EU Asylum Law and International Humanitarian Law’ in David Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill, 2014).

¹⁸⁹ The preamble to the 1969 Convention alone includes references to ten other international law instruments. These are: Declaration on the Problem of Subversion, Accra, 1965; Resolution on the Problem of Refugees, Accra, 1965; Charter of the United Nations; Universal Declaration of Human Rights; UNGA Resolution 2312 (XXII) of 14 December 1967, relating to the Declaration on Territorial Asylum; Charter of the Organization of African Unity; 1951 Refugee Convention and its 1967 Protocol; Resolutions 26 and 104 of the OAU Assembly of Heads of State and Government.

¹⁹⁰ For example, at the international level, the term ‘aggression’ is generally understood to be limited to acts perpetrated by the armed forces of a state, while African regional instruments also include a broader range of non-state actors and other foreign entities. See respectively Definition of Aggression (14 December 1974) UNGA Res 3314, art 1; Rome Statute of the International Criminal Court (opened for signature 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, art 8bis; African Union Non-Aggression and Common Defence Pact (opened for signature 31 January 2005, entered into force 18 December 2009) art 1(c).

¹⁹¹ Rankin, above n 1, 423-4; Edwards, above n 43, 216.

it represents a potential ‘blank cheque’ to would-be refugees.¹⁹² Existing analyses of the definition have looked to the meaning of ‘public order’ elsewhere in international law – including in the 1951 Convention¹⁹³ and other international human rights law instruments¹⁹⁴ – and even within the domestic law of individual states,¹⁹⁵ to understand its meaning in the definition.¹⁹⁶ However, while the meaning of ‘public order’ remains remarkably similar across these English language instruments – all of which use the phrase in the sense of ‘law and order’¹⁹⁷ – this meaning differs to the French version of the term, *ordre public*, which appears in the equally authoritative French version of the 1969 Convention. Within international law, the latter has been understood more broadly, as ‘the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded’.¹⁹⁸

Resolving the discrepancy between the different meanings of public order and *ordre public* elsewhere in international law requires careful consideration of the relevance of the various other international law instrument to the definition’s interpretation (under Article 31(3)(c) of the VCLT), the consistency of the respective meanings with the application of the general rule of interpretation (key principle 1), as well as the VCLT’s specific provisions on reconciling the meaning of treaties authenticated in multiple languages.¹⁹⁹ In short, while the humanitarian aims of the 1969 Convention might generally favour the broader meaning of the French ‘*ordre public*’, a holistic consideration of the criteria for ‘comparative treaty interpretation’ – which draws, in particular, on the ‘law and order’ formulation used in

¹⁹² See Wood, above n 38, 576.

¹⁹³ Articles 2 and 32 of the 1951 Convention include the term ‘public order’.

¹⁹⁴ For example, the preservation of public order constitutes a potential justification for the restriction of certain human rights. See International Covenant on Civil and Political Rights (opened for signature 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, arts 12(3); 14(1); 19(3)(b); 21; and 22(2); International Covenant on Economic, Social and Cultural Rights (opened for signature 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, art 8(1)(a).

¹⁹⁵ Rankin draws on the common law crime of breach of the King’s peace, as elucidated by the Supreme Court of Canada. Rankin, above n 1, 424.

¹⁹⁶ *ibid* 424-7; Edwards, above n 43, 218-220.

¹⁹⁷ Indeed, elsewhere in the 1969 Convention itself, public order occurs alongside the concept of ‘national security’ (art 6(1)) and the obligation on refugees to comply with host countries’ laws and regulations (art 3(1)).

¹⁹⁸ United Nations Economic and Social Council, ‘Syracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights’ UN Doc. E/CN.4/1985/4 (1985) annex, principle I(B)(iii). This has sometimes been equated with ‘public policy’ in English. See generally, Kent Murphy ‘The Traditional View of Public Policy and *Ordre Public* in Private International Law’ (1981) 11(3) Georgia Journal of International and Comparative Law 591, esp 591-5.

¹⁹⁹ VCLT, art 33.

African regional human rights law²⁰⁰ – favours the latter approach under the expanded refugee definition.²⁰¹

Ultimately, parallel interpretations of the expanded refugee definition’s terms from elsewhere in international law remain subject to the application of the VCLT’s principles of interpretation as a whole, including the other three key principle of interpretation set out here. Where terms appear in different contexts or in pursuit of different goals, this may warrant a different construction of their meaning. Thus, while comparative treaty interpretation may appear to provide a convenient short cut to interpretation, it will rarely, if ever, provide a automatic or definitive guide to the meaning of terms in the definition.

4.3. Applying the four key principles of interpretation: a brief note on methodology

As emphasised above, the four key principles of interpretation set out in this article provide a framework for a principled interpretation of the expanded refugee definition; however, all of the VCLT principles of interpretation will apply, where there is a use for them. A final comment is warranted on the *manner* in which the principles ought to be applied. For while there is a definite degree of hierarchy with the VCLT principles – the Article 31 ‘general rule of interpretation’, for example, is more important than the Article 32 ‘supplementary means’ of interpretation – the VCLT is silent regarding the manner or order in which the principles should be applied. Some commentators have proposed specific ‘starting points’ among the principles – including ordinary meaning,²⁰² other areas of international law,²⁰³ or examples of state practice.²⁰⁴ However, the interlacing nature of the principles and the need to apply them holistically makes any particular starting point difficult to justify as a universal approach. The interpretative framework set out above therefore does not require that the principles of interpretation must be applied in any particular order.

²⁰⁰ See African Charter on Human and Peoples’ Rights (opened for signature 27 June 1981, entered into force 21 October 1986) 21 ILM 58, arts 8 (freedom of conscience, the profession and free practice of religion), 12(2) (freedom of movement). Where certain ICCPR rights may be limited as necessary for ‘the protection of national security or of public order (*ordre public*), or of public health or morals’, African Charter rights may be limited where necessary for ‘the protection of national security, *law and order*, public health or morality’.

²⁰¹ This argument is developed more fully in a larger work by the author analysing the scope and meaning of the respective terms of the expanded refugee definition.

²⁰² Gardiner, above n 87, 162.

²⁰³ Edwards, above n 43, 212.

²⁰⁴ Gardiner, above n 87, 11.

In addition, the interpretative framework does not require that the principles be explicitly articulated when interpreting the definition, so long as the resulting interpretation is consistent with the principles themselves. Nevertheless, the explicit articulation of international law principles of treaty interpretation in discussions regarding the definition's scope and meaning, as well as in its practical application within refugee status determination procedures in Africa, should be encouraged. This would undoubtedly enhance transparency, consistency and fairness in refugee status decision-making, as well as provide a sound basis for further debate regarding the definition's scope and meaning.

5. CONCLUSION

The context in which the 1969 Convention applies has changed in the 50 years since its adoption. Colonial rule in Africa has given way to intra-state conflict, political upheaval and environmental change as the key drivers of displacement. Generous and 'open door' refugee policies among African states have been replaced by a more tightly regulated and 'legalised' approaches to refugee status determination. These changes do not in themselves undermine the scope and effectiveness of refugee protection in Africa; however, they do require a more rigorous and principled approach to understanding Africa's expanded refugee definition than has hitherto been provided. In 2017, there were nearly 25 million people in Africa living outside their country of origin.²⁰⁵ While not all were in need of international protection, a significant number left their homes due to insecurity, instability and/or a lack of access to fundamental means of survival.²⁰⁶ Clarity regarding the scope of the definition is critical to identifying who, among those who move, is entitled to protection as a refugee.²⁰⁷

This article established the need and the framework for a more principled interpretation of the 1969 Convention's Article I(2) expanded refugee definition. It explained why a principled interpretation of the definition is so important and articulated four key principles for its interpretation. Together, the four key principles provide the foundation of a more principled

²⁰⁵ United Nations Department of Economic and Social Affairs, 'International Migration Report 2017: Highlights' UN Doc ST/ESA/SER.A/404 (2017) 2.

²⁰⁶ In 2017, UNHCR estimated the total number of refugees in Africa to be just over 6.2 million, amounting to almost a third of all international migrants in Africa, and nearly one third of all refugees worldwide. See UNHCR, 'Global Trends 2017' (2018) Annex Table 1.

²⁰⁷ It goes without saying that so, too, is clarity regarding the scope of the universal refugee definition, which is outside the scope of this article.

approach to the definition's interpretation, and an accessible source of guidance for those charged with interpreting and applying the definition in practice. As acknowledged above, the principled interpretative framework set out in this article does not provide a formula for producing an irrebuttable interpretation of the definition's terms – as is the case elsewhere in law, a principled interpretation of the definition might yield a range of reasonable and justifiable views regarding its scope and meaning. However, the four key principles do provide a framework for helping to ensure that the implementation of the expanded refugee definition within African states is fair, transparent, consistent with international law, and ultimately, provides meaningful protection to refugees.