

**Conceptualising poverty as a ground for refugee status under the 1969 OAU
Refugee Convention**

**Submitted in partial fulfilment of the requirements of the degree LLM
(Multidisciplinary Human Rights)**

By

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Dedications

To the Lord and Saviour of my life, the one who found it pleasing in His will for me to pursue this Master's degree. May you grow my desire and passion to learn more about refugee and forced migration.

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Abbreviations

AU – African Union

CRRF – Comprehensive Refugee Response Framework

ICCPR – International Covenant on Civil and Political Rights

ICESCR – International Covenant on Economic, Social and Cultural Rights

IGAD – Intergovernmental Authority on Development

OAU – Organisation of African Unity

PPA – Participatory Poverty Assessment

RSD – Refugee Status Determination

SE – Social Exclusion

UDHR – Universal Declaration of Human Rights

UNHCR – United Nations High Commissioner for Refugees

VCLT – Vienna Convention on the Law of Treaties

Title Page	i
Declaration of Plagiarism	ii
Dedication	iii
Acknowledgment	iv
Abbreviations	v
Table of Contents	vi
1. Introduction	1
1.1 Background	1
1.2 Problem Statement	1
1.3 Research Questions	2
1.4 Significance of the Study	2
1.5 Definition of terms	3
1.6 Research Methodology	3
1.7 Literature Review	4
1.8 Outline of Chapters	8
2. Chapter One	10
2.1 History of Refugee Law	10
2.2 The 1969 OAU Convention and the “expanded definition”	13
2.3 The Nature and Scope of the “expanded definition”	15
a) Group refugee status determination	16
b) Prima facie refugee status determination	16
2.4 The Way Forward	17
3. Chapter Two	18
3.1 Legal interpretation of the “expanded definition”	18
3.2 Subjectivity versus Objectivity	20
3.3 Interpreting the “expanded definition”	21
a) Events seriously disturbing public order	22
<i>i. “Public order”: A multidisciplinary approach</i>	22
<i>ii. “Public order”: The approach of various scholars</i>	24
<i>iii. Nature of events</i>	25
b) In either part or whole of his country of origin or nationality	27
c) Compelled to leave his place of habitual residence	27
4. Chapter Three	28
4.1 Defining Poverty	29
4.2 Amartya Sen: Freedom from Poverty and Capability Deprivation	31
a) Freedom from Poverty	32
b) Poverty as “Capability Deprivation”	33
4.3 Conceptualising poverty as a ground for “events seriously disturbing public order”	34
4.4 Distinguishing between economic migrants and refugees fleeing poverty	37
5. Chapter Four	40

5.1 A Solution: Burden Sharing	41
5.2 Drawing inspiration from the Comprehensive Refugee Response Framework	43
6. Chapter Five: Recommendations and Conclusions	46
7. Bibliography	47

1. Introduction

1.1 Background

Millions of people on the African continent suffer from grave circumstances of poverty. Hunger, starvation and lack of adequate nourishment are most perpetuated and felt in Africa, with a noted increase of undernourishment from 19.7% in 2016 to 20.4% in 2017.¹ Meanwhile, access to adequate and clean water supply, housing and sanitation continue to deteriorate on the continent, claiming 2.6million lives annually.² Furthermore, the spread and perpetuation of communicable and non-communicable diseases has led to short life spans on the African continent. The average rate of life expectancy amongst African women is ten years lower than the global rate while the average level for African men is nine years lower than the global level.³ As a result of numerous factors affecting these freedoms from undernourishment and starvation, inadequate standards of living and low rates of mortality and morbidity,⁴ the livelihood of Africans depreciates and even poses a threat to their survival. Hence, people enduring such conditions should be able to flee and seek asylum in other African countries.

1.2 Problem Statement

The 1951 Convention Relating to the Status of Refugees (1951 Convention) governs refugee matters on the global front. Refugee status is granted to anyone fleeing personal persecution perpetuated on one or more of the bases of ‘race, religion, nationality, membership of a particular social group or political opinion...’⁵ The 1969 OAU Convention mirrors a similar provision but further adds another ground for the definition of a refugee known as the “expanded definition”. This “expanded definition” extends refugee protection to

“[e]very person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.”⁶

¹ Food and Agriculture Organisation of the United Nations ‘The State of Food Security and Nutrition in the World: Building Climate Resilience for Food Security and Nutrition’ (2018) last accessed on 15 October 2018 at <http://www.fao.org/3/I9553EN/i9553en.pdf> 2-4.

² Solidarites International ‘2018 Water, Hygiene and Sanitation Barometer: Inventory of access to a vital resource ‘ (2018) last accessed on 15 October 2018 at <https://www.solidarites.org/wp-content/uploads/2018/05/2018-Water-Hygiene-and-Sanitation-Barometer.pdf> 6.

³ Statista ‘Average life expectancy in Africa for those born in 2018, by gender and region (in years)’ last accessed on 15 October 2018 at <https://www.statista.com/statistics/274511/life-expectancy-in-africa/>.

⁴ T Pogge ‘Severe Poverty as a Human Rights Violation’ in T Pogge *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (2007) 11.

⁵ 1951 Convention Relating to the Status of Refugees, Article 1A(2).

⁶ 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, article I(2).

Henceforth, the 1969 OAU Convention has been praised for taking notable and progressive steps towards the protection of refugee rights beyond the provisions of the 1951 Convention.⁷ However, the lack of jurisprudence by the Organisation of Africa Unity (OAU) and the African Union (AU), its succeeding body, has left the “expanded definition” ambiguous and unclear.⁸ The lack of such jurisprudence has discouraged OAU member states from implementing the “expanded definition”⁹ and this has undermined its flexibility and innovativeness.¹⁰ The “expanded definition” should rather be constantly adaptive to the changing refugee realities. By failing to do so, it does not extend refugee protection to vulnerable Africans in desperate need of it, specifically those fleeing grave circumstances of poverty.

1.3 Research Questions

Is the “expanded definition” still applicable in Africa?

How can the ground “events seriously disturbing public order” be interpreted?

Does poverty qualify as a ground for refugee status under the “expanded definition?
Does poverty constitute a threat to public order?

If poverty qualifies as a ground for refugee status under the ground “events seriously disturbing public order”, how can the burden in host countries be alleviated?

1.4 Significance of the Study

Forty-four years from the adoption of the 1969 OAU Convention, it is worrisome to find that there have been insufficient developments in clarifying the “expanded definition”. Since the “expanded definition” was established in the ambience of decolonisation,¹¹ some theorists disqualify the 1969 OAU Convention from application in the present day due to the fact that most African states have gained independence and decolonisation is no longer on the agenda of African states. On the contrary, others hold that the 1969 OAU Convention is in fact still relevant to the current African refugee realities.¹² Nonetheless, refugee movements still occur today, triggered by myriad issues, including but not limited to ‘the emergence of one party systems, military and minority regimes, extra-constitutional means of change of governments, internal armed conflicts or civil wars and broader conflicts or claims’.¹³ There is also a growing realisation that, rather than on the grounds of personal persecution stipulated in the

⁷ MB Rankin ‘Extending the Limits or Narrowing the Scope? Deconstructing the OAU Refugee Definition Thirty Years On’ (2005) 21 *SAJHR* 406.

⁸ Rankin (n 7 above) 407.

⁹ T Wood ‘Expanding Protection in Africa: Case Studies of the Implementation of the 1969 OAU African Refugee Convention’s Expanded Definition’ (2014) 26 *International Journal of Refugee Law* 564.

¹⁰ Rankin (n 7 above) 415.

¹¹ Rankin (n 7 above) 415.

¹² Rankin (n 7 above) 415.

¹³ MT Ladan *Migration, Trafficking, Human Rights and Refugees under International Law:- A Case Study of Africa* (2004) 248-249.

1951 refugee definition, large-scale forcible movements in Africa are also more commonly triggered by 'poverty, environmental disasters and armed civil conflicts or war'.¹⁴ Hence, it is imperative and necessary to interpret the "expanded definition" so that it may effectively resolve the new, unique African refugee realities that it was purposed to resolve.¹⁵

1.5 Definition of Terms

Refugee

In terms of the 1951 Convention, a refugee is someone who is forced to flee personal persecution on one or more of the grounds of 'race, religion, nationality, membership of a particular social group or political opinion...'¹⁶

The 1969 OAU Convention reflects this definition and further provides that a refugee is someone 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.'¹⁷

Poverty

While the discourse on poverty is a widely contest space, this paper will accord with Amartya Sen's conceptualisation of poverty. Sen implements the capability approach to poverty, which defines poverty as the inability of people to lead lives 'that are universally accepted as fundamental for human development'.¹⁸

Public Order

"Public Order" refers to the maximisation of goal values that are concerned with the respect and fulfilment of fundamental values of 'human dignity or a free society'.¹⁹

1.6 Research Methodology

The methodology used will be a compilation of desktop and library research. As this study adopts a multidisciplinary approach, it will explore various disciplinary approaches.

¹⁴ Ladan (n 13 above) 311.

¹⁵ Rankin (n 7 above) 407.

¹⁶ 1951 Convention, article 1.

¹⁷ 1969 OAU Convention, article I(2).

¹⁸ CR Laderchi, R Saith and F Stewart 'Does it Matter that we do not agree on the Definition of Poverty? A Comparison of Four Approaches' (2013) 31 *Oxford Development Studies* 268-269.

¹⁹ MS McDougal, HD Lasswell and L Chen *Human Rights and the World Public Order: The Basic Policies of an International Law of Human Dignity* (1980) 90.

A historiographic approach is necessary to study the history behind the drafting of the 1969 OAU Convention. The circumstances under which it was drafted will inform the purpose and intention of the drafters. Therefore, the scope of the “expanded definition” and to whom it provides protection can be ascertained. It will demonstrate how changing African realities prove that the “expanded definition” is still relevant in Africa.²⁰ Thereby, new prevailing circumstances are constantly evident and this paper calls for recognition and protection of increased numbers of refugees arising as a result of these new push-factors.

Legal and treaty interpretation will be adopted to ascertain what the phrase “events seriously disturbing public order” means and entails. Different rules of interpretation and views held by various scholars will be explored. The discipline of sociology will also be explored to determine the meaning of “public order”.

Sources to be consulted will include books, journal articles, international treaties, working papers, reports, internet sources, newspaper articles, non-governmental organisation reports and other secondary materials.

1.7 Literature Review

As an introduction, a brief historic oversight of the 1969 OAU Convention is necessary. This is intended to help with understanding the issues that it was responding to at the time of its conception and determining if it is then still relevant today. After Africa had endured years of brutal and inhuman colonial rule, the 1960s marked the beginning of its end and the rise of independent African states. The years of the colonial rule had fuelled high levels of migration between neighbouring African countries. Hence, African states saw it fit and indispensable to include article I(2) into the 1969 OAU Convention due to the fact that the 1951 Convention failed to reflect this African situation and thus provide protection to refugees affected by the colonial regime.²¹

Thereafter, it is important to note that while colonial regimes have long come to an end, patterns of refugee movements continue to intensify in post-independent African states.²² While it may be debatable if the first three grounds of the “expanded definition” are still applicable today, Marina Sharpe expresses the viewpoint that the ground “events seriously disturbing public order” continuously gains more relevance with regards to African refugee realities. Hence, it is crucial to interpret its meaning and scope in order to ensure its effective implementation.²³ This is the ground that this paper is concerned with interpreting and applying to situations of poverty.

²⁰ Rankin (n 7 above) 415.

²¹ A Edwards ‘Refugee Status Determination in Africa’ in (2006) 14 *African Journal of International and Comparative Law* 209.

²² J Oloka-Onyango ‘Human Rights, the OAU Convention and the Refugee Crisis in Africa: Forty Years after Geneva’ (1991) 3 *International Journal of Refugee Law* 454.

²³ M Sharpe ‘The 1969 African Refugee Convention: Innovations, Misconceptions and Omissions’ (2012) 58 *McGill Law Journal* 113.

The starting point in interpreting the ground “events seriously disturbing public order” is the Vienna Convention of the Law of Treaties, 1969 (VCLT). In terms of the general rule of interpretation, ‘[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.’²⁴ In this case, the preamble of the 1969 OAU Convention can shed light on the object and purpose.²⁵ In order to determine the context of the 1969 OAU Convention, consideration must be given to the 1951 Convention and the 1967 Protocol as subsequent practices of similar subject matter.²⁶ However, ‘lack of case law, limited evidence of state practice, and a near absence of *travaux préparatoires*’ render legal interpretation by the OAU through the VCLT unhelpful.²⁷ The newly rising refugee realities in Africa urgently require the AU to interpret the “expanded definition” so that it can resolve the refugee crises on the continent.

In the absence of legal interpretation by the OAU, it is then important to discuss the ground “events seriously disturbing public order” as explored by different scholars. Sharpe attempts to clarify the ground by posing three questions: ‘Does it encompass events of a non-international character?; What is meant by “disruption of public order”? and; What would qualify as serious?’ Sharpe ascertains that events could have either an international or non-international character. In terms of the second question, Sharpe explores different positions without reaching a conclusion, except for establishing that “public order” relates to ‘administrative, social, political and moral order.’ On the last question, Sharpe is of the opinion that numerous, cumulative events posing a threat to life suffice for a serious level of disorder to be established.²⁸

It is important to first determine the meaning and scope of public order. Sharpe’s reference of “public order” to ‘administrative, social, political and moral order’²⁹ reveals the multidimensional nature of “public order” that will necessitate a multidisciplinary approach. In the absence of a legal international definition herein, exploring the meaning of “instability” may provide more direction, as the two concepts are closely connected. “Instability” should not be interpreted restrictively but should rather also be interpreted through the lens of a multidisciplinary approach. Therefore, through the study of sociology, “instability” is more commonly referred to as “social order”.³⁰ “Social order” does not only mean the absence of political acts of violence and conflict, but also extends to include ‘condition[s] of sustainable development and well-being’. Thus,

²⁴ Vienna Convention on the Law of Treaties 1969, article 31.

²⁵ VCLT, article 31(2).

²⁶ VCLT, article 32.

²⁷ Rankin (n 7 above) 418.

²⁸ Edwards (n 21 above) 216-220.

²⁹ Edwards (n 21 above) 219.

³⁰ C Sengupta ‘Political and Social Stability: Ideas, Paradoxes and Prospects’ (2004) 39 *Economic and Political Weekly* 5102.

'poverty, hunger, exploitation, suicide, corruption, violence and other crimes' are examples of events that would then cause social disorder within a country.³¹

With the lack of legal interpretation, this multidisciplinary approach towards "stability" inspires a similar multidisciplinary approach to be applied to "public order". Sharpe criticises the common understanding of "public order" as referring only to armed conflict and other forms of similar violence. Rather, it should be read more widely so as to uphold the humanitarian aims of the 1969 OAU Convention.³² A political approach to "public order" is restrictive³³ and will exclude vulnerable people that are affected by the expansive concept of "public order", which the sociological approach largely contributes to.

McDougal provides extensive work on the sociological approach to public order. He stipulates that it refers to the maximisation of goal values that are concerned with the respect and fulfilment of fundamental values of 'human dignity or a free society'.³⁴ While there are seven listed values that are then translated into demands, the two that are of particular interest herein are the demands relating to wealth and well-being.³⁵ Demands relating to wealth are concerned with ensuring freedom to enjoy an adequate standard of living while demands relating to well-being seek to ensure freedom to enjoy adequate nourishment, adequate standard of living and ability to lead a life of normal life expectancy.

After exploring the sociological approach to "public order", it is important to ascertain the nature of the events that seriously disturb it. This question has been the site of much deliberation amongst scholars. Eduardo Arboleda states that the "expanded definition" events are life-threatening and trigger forcible mass movements of people. Since there is no persecution on the basis of any of the grounds mentioned in the 1951 Convention refugee definition, the "events seriously disturbing public order" are objectively ascertained.³⁶ On the contrary, Rankin raises concerns about implementing a solely objective test.³⁷ Sharpe qualifies Rankin's concerns by stipulating that some elements of the "expanded definition require a subjective test, for example, the determination of compulsion.³⁸ Edwards further provides a list of factors that would prove the subjective compulsion of the refugee applicants' flight

³¹ Sengupta (n 30 above) 5103.

³² M 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' in UNHCR *Legal and Protection Policy Research Series* (2013) 15.

³³ Sharpe (n 32 above) 15.

³⁴ McDougal, Lasswell and Chen (n 19 above) 90.

³⁵ MS McDougal and HD Lasswell 'The Identification and Appraisal of Diverse Systems of Public Order' in MS McDougal et al *Systems in World Public Order* (1987) 11.

³⁶ MRK Rwelamira 'Some Reflections on the OAU Convention on Refugees: some pending issues' (1983) 16 *The Comparative and International Law Journal of Southern Africa* 559.

³⁷ Rankin (n 7 above) 411.

³⁸ Sharpe (n 23 above) 114.

from their countries of origin or nationality. This list is not onerous, but rather ascertains the existence of the refugees' compulsion.³⁹

The final aspect of the "expanded definition" that requires an examination is the phrase "seriously disturb". While Rankin simply states that a wide-ranging violation of key human rights would constitute a serious disturbance of "public order",⁴⁰ Edwards expands on the nature of the violation by stipulating that it must be persistent, widespread or endangering to the life, liberty or security of large populations.⁴¹ Another indication of the existence of "events seriously disturbing public order" is the unwillingness or inability of the government to extend protection to its citizens where law and order has broken down.⁴² Evidently, there is a high standard of substantiating poverty as a ground of "events seriously disturbing public order". It is essential to refrain from opening the ground too wide as poverty, being widespread across Africa, would overburden the refugee systems in African states.

While there are several definitions and approaches adopted by different scholars, this mini-dissertation will adopt the one used by Sen. It is concerned with the idea of 'impoverished lives' where individuals are deprived of their fundamental freedoms. These entail 'the freedom to be adequately nourished, the freedom to enjoy adequate living conditions, the freedom to lead normal spans of life, and the freedom to read and write'.⁴³ Since the right to life constitutes the list of rights from which there is an exception to derogation by the state,⁴⁴ this paper will discuss the freedoms to enjoyment of sufficient nourishment, adequate living conditions and leading of lives of normal life expectancy. These freedoms largely affect the right to life. Again, this seeks to prevent large numbers of poor people from unjustifiably seeking refugee protection under the "expanded definition".

Another aspect of the debate necessary to settle herein is the distinction between refugees suffering the conditions of poverty and economic migrants. The distinction is necessary as Michelle Foster mentions the unsympathetic attitude towards economic migrants who voluntarily migrate for purposes of seeking a 'better life'.⁴⁵ Given the indigent circumstances of poverty that some refugees flee from, their movement is involuntary and they should hence receive protection. Furthermore, Foster mentions that economic hardship affecting realisation of economic and social benefits could be exacerbated by an oppressive government that violates civil and political rights. Evidently so, violation of civil and political rights in this case would impact the enjoyment of economic and social rights, showing then the interdependence,

³⁹ Edwards (n 21 above) 230.

⁴⁰ Edwards (n 21 above) 220.

⁴¹ Rankin (n 7 above) 426.

⁴² Wood (n 9 above) 565.

⁴³ P Vizard *Poverty and Human Rights: Sen's 'Capability Perspective' Explored* (2006) 3.

⁴⁴ UN doc. CCPR/C/21/Rev.1/Add.11 para 7.

⁴⁵ M Foster *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (2007) 6.

interrelatedness and indivisibility of rights.⁴⁶ Hence, it would be vital to extend protection to those fleeing poverty as refugees in accordance with the 1969 OAU Convention.

The expansive interpretation of the “expanded definition” ought to be balanced with the implementation of durable solutions that alleviate the burden of hosting large groups of refugees imposed on host nations. The burden-sharing principle is recognised in the 1969 OAU Convention⁴⁷ and further supported and strengthened by the United Nation’s Comprehensive Refugee Response Framework (CRRF). The CRRF promotes a two-dimensional approach to managing the refugee crises across the globe. On the one side of the coin, it encourages equitable refugee burden sharing amongst states and other actors. On the other side, in the aim to improve the conditions of the refugees’ countries of origin or nationality, it promotes initiatives of State-building in the refugees’ countries of origin and nationality so as to foster willing, effective and possible return of refugees.⁴⁸ In that way, not only would refugees be able to return to enjoying lives free of poverty in their countries of origin or nationality, but it would also combat the causes of refugee flows and enhance development of the African continent.

1.8 Outline of Chapters

Chapter One will detail the history of the African refugee system in Africa. It will highlight two of its commonly confused features, that is, the group refugee status determination (RSD) and *prima facie* RSD bases.

Chapter Two will discuss the interpretation of the phrase “events seriously disturbing public order” as included in the “expanded definition”. It will explore the legal interpretation according to the VCLT and, in the current absence of legal interpretation having been applied to this ground, the study will incorporate a multidisciplinary approach to understanding “public order”. The views of various scholars on how the phrase can be interpreted will also be explored.

Chapter Three will demonstrate whether poverty constitutes an event “seriously disturbing public order” according to the criteria set out in the previous chapter.

Chapter Four will study the principle of refugee burden sharing and the way in which the CRRF has just begun paving an innovative solution to implementing regional and sub-regional mechanisms thereof.

⁴⁶ Foster (n 45 above) 9 and 13.

⁴⁷ 1969 OAU Convention, article II(4).

⁴⁸ UNHCR ‘Applying Comprehensive Responses (CRRF) in Africa’ (2018) last accessed on 1 November at <http://www.globalcrf.org/wp-content/uploads/2018/08/CRRF-in-Africa-poster-August-2018-FINAL.pdf> 2.

Chapter Five will provide a conclusion and some recommendations that must be considered in conceptualising poverty as ground for refugee status according to the 1969 OAU Convention.

2. Chapter One

Numbers of displaced persons on the African continent continue to soar to unprecedented levels. The United Nations High Commissioner for Refugees (UNHCR) reports this number to have reached 24.2million in 2017⁴⁹ as compared to an estimated 20million in 2016.⁵⁰ Nonetheless, this figure may be conflated by the mixed migration patterns constituting a complex combination of economic migrants, internally displaced persons, refugees, amongst other displaced groups. Forced displacement on the continent is more commonly triggered by conflict, development schemes, conservation plans, economic reform and ecological catastrophes, to mention just a few push-factors.⁵¹

2.1 History of Refugee Law

Displacement in Europe was triggered by the political and social upheavals that occurred during the second World War.⁵² The 1951 Convention was established to resolve the resulting displacement and refugee flows. It stipulates that refugee status is afforded to anyone fleeing personal persecution on the grounds of 'race, religion, nationality, membership of a particular social group or political opinion' perpetuated by the events of the second world war.⁵³ Henceforth, it was limited geographically, to displaced persons in Europe; temporally, to those displaced before 1 January 1951; and based on personal persecution, to those victimised on one or more of the specified grounds as a result of the second world war.

By limiting the circumstances under which the 1951 Convention could extend refugee protection, the concept of "Convention" refugees and *de facto* refugees arose in Europe. "Convention" refugees are displaced people who endured persecution on one or more of the stipulated grounds and thus, receive refugee protection. On the contrary, *de facto refugees* are deprived of legal refugee protection and legal assistance by the UNHCR. They are displaced persons forced to flee their countries of origin or nationality due to circumstances that may not be encompassed in the 1951 Convention.⁵⁴ People forcibly displaced as *de facto* refugees did not receive refugee protection.

The 1960s marked the beginning of the increasing refugee surge in Africa. The process of decolonisation and the commencement of tribal wars, which began unfolding in newly independent states, contributed significantly to the conception of the refugee problem. A significantly larger rise of refugee numbers was attributed to the abhorrent, oppressive, racist governments in Mozambique, Angola, Guinea Bissau (known then as Portuguese Guinea), South Africa and Zimbabwe (known then as

⁴⁹ UNHCR 'Regional Summaries: Africa' in *UNHCR Global Report 2017* (2018) 61.

⁵⁰ UNHCR 'Regional Summaries: Africa' in *UNHCR Global Report 2016* (2017) 51.

⁵¹ Edwards (n 21 above) 205.

⁵² See MT Ladan (n 13 above) 248.

⁵³ 1951 Convention, article 1A(1).

⁵⁴ G Melander and P Nobel *African Refugees and the Law* (1978) 77.

Rhodesia), and the strengthened fights for independence in retaliation thereof.⁵⁵ The geographical scope, temporal limit and requirement for persecution on any one or more of the grounds stipulated in the 1951 Convention refugee definition excluded them from receiving protection. Hence, they could only receive humanitarian assistance, and not legal refugee status protection, from the UNHCR.⁵⁶ The deprivation of refugee protection to Africans left them vulnerable, unable to receive refugee protection in host countries and still exposed to the very dangers from which they attempted to flee.

The continuously increasing refugee numbers in Africa began to draw the United Nations General Assembly's attention. Privy to the impact that the decolonisation process and the widespread conflict was imposing, the UNHCR would occasionally be mandated to extend protection and assistance to displaced Africans from the late 1950s, despite the geographical and temporal parameters of the 1951 Convention. It thus seemed logical to extend the scope of the 1951 Convention to other regions of the world beyond Europe. This led to the process of establishing and enacting the 1967 Protocol Relating to the Status of Refugees (1967 Protocol). It removed the phrase 'as a result of events occurring before 1 January 1951', hence, eliminating the geographical and temporal limits of the 1951 UN Convention.⁵⁷ Thereby, Africans that were forcibly displaced on the continent were now able to receive legal refugee protection under the 1951 Convention, and legal assistance from the UNHCR as they now would fall within their legal, and not only under their humanitarian mandate.

Nonetheless, many African refugees were still excluded from receiving refugee protection even after the implementation of the 1967 Protocol. The 1951 Convention was developed as a solution to the problems prevailing in Europe. African refugee experiences caused by various factors, including but not limited to, poverty, environmental disasters and armed civil conflicts or war, which may not have occurred on the basis of persecution on any of the grounds mentioned in the 1951 Convention refugee definition were not encompassed thereof.⁵⁸ The OAU then felt the urgency to explore this question and to develop a home-grown instrument that would respond to the unique African refugee realities not covered in the 1951 Convention. The 1969 OAU Convention thus aimed to invent an "Africanise(d)" refugee definition.⁵⁹ It intended to extend refugee protection to forcibly displaced Africans and hence, reconcile the mismatch between the ever-increasing refugee numbers and the restrictive 1951 Convention.

⁵⁵ E Arboleda 'Refugee Definition in Africa and Latin America: The Lessons of Pragmatism' (1991) 3 *International Journal of Refugee Law* 190.

⁵⁶ EO Awuku 'Refugee Movements in Africa and the OAU Convention on Refugees' (1995) 39 *Journal of African Law* 80.

⁵⁷ 1967 Protocol Relating to the Status of Refugees, article 1(2).

⁵⁸ Ladan (n 13 above) 311.

⁵⁹ Rankin (n 7 above) 407.

The drafting process of the 1969 OAU Convention was a thorough, collaborative effort of the OAU and the UNHCR towards creating a regional refugee instrument.⁶⁰ There were significant inadequacies in the initial product of the drafting process, the “Kampala Draft”, presented in 1964, leading to its rejection. Thereafter, the OAU Council of Ministers established and mandated a body of legal experts to make relevant corrections. They produced the subsequent “Leo Draft” in 1965 but it was also rejected by the OAU Council of Ministers and Heads of State for being even more inflexible than the 1951 Convention. Throughout this process, member states of the OAU were urged to ratify and implement the 1951 UN Convention to the refugee cases in their countries.⁶¹ While the OAU member states respected the 1951 Convention as the general framework for refugee issues, their critiques of the “Kampala Draft” and the “Leo Draft” reflected their disapproval of the African regional refugee instrument making minimal changes to, but largely still regurgitating the 1951 Convention.⁶² The rigorous process to create the final product illustrates the expectation of the 1969 OAU Convention to respond to and accommodate the unique African refugee situations.

While the OAU internal process was taking place, the OAU Secretary-General and the UNHCR were jointly examining the African refugee realities and whether the 1951 Convention could be applied to them. The final result of this collaboration was the production of a draft document taking into account the particularly African situations.⁶³ At this OAU/UNHCR Symposium on Refugees and Forced Population Displacements in Africa, there was a recognition that the effects of colonialism in post-colonial Africa are more so evident today, as it continuously perpetuates inequalities in the international economy. The ‘competition over scarce resources’, hindrance to human development, degradation of the environment, governments’ lack of control, government’s inability to perform its functions and to maintain the country’s infrastructure and inadequate access to services are only a few current African realities caused one way or another by colonisation and contributing to the main causes of forced migration.⁶⁴ Evidently, the deep-seated refugee crisis on the continent would need to be combatted by rigorous, constant efforts.

Meanwhile, the “Leo draft” was appropriately modified and it was later adopted by the OAU Assembly of Heads of State and Government in 1969. This final product, as its title reveals, was directed towards extending refugee protection in cases unique to African refugees that fell outside of the ambit of the 1951 Convention.⁶⁵ The OAU member states were devoted to following a thorough process to invent home-grown solutions for a constantly growing refugee crisis that the 1951 Convention failed to

⁶⁰ Arboleda (n 55 above) 193.

⁶¹ See Arboleda (n 55 above) 192.

⁶² See Arboleda (n 55 above) 194.

⁶³ See Rwelamira (n 55 above) 166.

⁶⁴ OAU/UNHCR Symposium on Refugees and Forced Population Displacements in Africa ‘The Addis Ababa Document on Refugees and Forced Population Displacements in Africa’ (1994) para 9 last accessed on 1 November 2018 at

https://www1.essex.ac.uk/armedcon/story_id/theaddisabadadocumentonrefugees.pdf.

⁶⁵ Rwelamira (n 36 above) 167.

sufficiently resolve. The final product was the 1969 OAU Convention, of which its unique “expanded definition” is of particular interest in this research paper and will be further discussed below.

2.2 The 1969 OAU Convention and the “expanded definition”

The first part of the 1969 OAU Convention refugee definition echoes the one provided in the 1951 Convention.⁶⁶ It further defines a refugee as

‘[e]very person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.’⁶⁷

The second aspect of the refugee definition in the 1969 OAU Convention is commonly referred to as the “expanded definition” since it defines a refugee beyond the scope of the 1951 Convention. The relevant response of the “expanded definition” to the unique African refugee realities has afforded the 1969 OAU Convention praise as the global leading refugee instrument, for its flexibility and innovativeness.⁶⁸ Does this render the 1951 Convention impractical and inapplicable to the present-day refugee problems in Africa?

Irrespective of the fact that the 1967 Protocol had the effect of extending refugee protection entailed in the 1951 Convention to the rest of the world, there was a failure to appreciate that forced displacement in other parts of the world was triggered by factors it did not include. Intensifying forced cross-border movements in the global South were, and continue, to be caused by one or more occurrences of ‘war, political instability, internal civil strife, economic turmoil and natural disasters.’⁶⁹ The application of the 1951 Convention continues to narrowly distinguish refugees and thereby excludes a countless number of vulnerable forcibly displaced people that flee such refugee-like situations and are in desperate, apparent need of refugee protection.

Rather than strengthening human rights practice in general and advancing refugee practice specifically, the narrow application of the 1951 Convention hinders development of refugee law and even retracts the progress already made in international human rights protection.⁷⁰ It fails to recognise and adapt to the realities and to respond to the grave violations of human and refugee rights.

While the 1951 Convention has been held to be rigid and irrelevant to the present-day refugee crisis, some scholars, including the UNHCR, have opposed such arguments.

⁶⁶ 1969 OAU Convention, article I.

⁶⁷ 1969 OAU Convention, article I(2).

⁶⁸ Rankin (n 7 above) 406.

⁶⁹ Arboleda (n 55 above) 186.

⁷⁰ G Okoth-Obbo ‘Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa’ (2001) 79 *Refugee Survey Quarterly* 113.

They argue that the 1951 Convention was developed as a legal instrument to deal with the forced migration triggered as a result of the second world war in Europe. It should, therefore, not be criticised for insufficiently resolving refugee issues falling outside of its objective. Neither was it intended as a permanent legal instrument for refugee issues in Europe itself and, further, across the globe.⁷¹ Just as the refugee discourse has, continues and will continue to change, it is illogical that the 1951 Convention can be expected to have responded to the refugee issues happening today and expected to happen in future, since it was primarily a temporal response to the specific events pursuant to the world war II in Europe.

Despite changing refugee realities, the specified grounds in the 1951 Convention refugee definition can still be applied to some African refugee experiences today. Irrespective of its geographical scope and temporal limit, which were subsequently amended by the 1967 Protocol, the 1951 Convention was and is still applicable to some African refugee realities.⁷² The “expanded definition” serves to cater for the majority of the African refugee realities not sufficiently encompassed in the 1951 Convention. The drafters intended the 1969 OAU Convention, and the “expanded definition” particularly, to operate alongside the 1951 Convention and not to render it void and inapplicable.⁷³ There is room for complementary regional legal instruments to exist and operate in conjunction with the 1951 Convention, which provides a basic framework for international refugee law. The 1969 OAU Convention has innovatively identified and bridged the gaps between African refugee realities and the 1951 Convention. Therefore, the 1951 Convention refugee definition is not entirely irrelevant for application in Africa.

Unity amongst African member states was one of the primary concerns of the drafters of the 1969 OAU Convention. They sought to balance the protection of the national security of African States, while preserving amicable ties between each other and providing refugee protection to ‘freedom-fighters’ opposing colonial regimes.⁷⁴ There was appreciation of the need to unite as Africans against the colonial rule and thereafter strengthen their relationships which colonial invasion had the effect of profoundly disintegrating. The 1969 OAU Convention’s liberalism and humanitarianism translates into its aim to ‘[depoliticise] asylum [by encouraging extension of refugee protection] without implicitly accusing another government of being persecutory’.⁷⁵ The “expanded definition” has laid down a striking, ground-breaking approach to resolving refugee issues while still ensuring unity amongst states.

The “expanded definition” has notably paved the way for similar refugee developments in Central America through the 1984 Organisation of American States’ Cartagena

⁷¹ Ladan (n 13 above) 285.

⁷² Edwards (n 21 above) 231.

⁷³ Rankin (n 7 above) 409.

⁷⁴ See Wood (note 9 above) 558.

⁷⁵ See Wood (n 9 above) 555-556.

Declaration on Refugees (Cartagena Declaration).⁷⁶ The rapidly increasing numbers of forcibly displaced Salvadorans and Guatemalans, amongst other nationalities, saw the 1951 Convention failing to address the new refugee realities in Latin America. Furthermore, the simultaneous movement of Haitians and Cubans seeking economic opportunities elsewhere conflated the migration calamity. These movements had an intensifying negative impact on the regions from Panama right through to Mexico and ultimately Canada and the United States of America. It thus became imperative to address the situation through a regional meeting known as “the 1984 Colloquium”. The result of the meeting was the Cartagena Declaration, and although it could not be implemented as a legally binding instrument due to the unfavourable political atmosphere at the time, it still provides the widest refugee definition in Latin America thus far.⁷⁷

Although slightly different from the 1969 OAU Convention, the Cartagena Declaration defines a refugee as someone fleeing their country of origin due to ‘their lives, safety or freedom [being] threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.’⁷⁸ Since the 1969 OAU Convention inspired the Cartagena Declaration, it should also inspire an understanding of the “expanded definition” being concerned with providing refugee protection to people whose lives, security or liberty are threatened by any of the four events it entails

2.3 The Nature and Scope of the “Expanded Definition”

Sharpe has criticised the overly wide-ranging, inclusive and far-reaching interpretation of the “expanded definition”.⁷⁹ While she does appreciate the fact that the “expanded definition” has enabled refugee protection to be afforded to those abandoned by the 1951 Convention, she views it as only progressively and slowly doing so.⁸⁰ Despite the applause that the “expanded definition” has received for its expansion of the refugee definition, it is considerably unclear and ambiguous. The lack of interpretative jurisprudence by the OAU and the AU necessitates cautious study of the “expanded definition”.⁸¹ Little guidance is provided in determining this important article in a context of an ever-changing African refugee climate.

An examination of the nature of the “expanded definition” sheds some light on the meaning of the article. The two debated aspects of its nature are its group RSD and *prima facie* RSD bases. These two concepts have been developed as mechanisms to address that forced large-scale movement of people as prompted by the events of the

⁷⁶ See Wood (n 9 above) 560.

⁷⁷ See generally Arboleda (n 55 above) 201-204.

⁷⁸ 1984 Organisation of American States’ Cartagena Declaration on Refugees, Article III(3).

⁷⁹ Sharpe (n 23 above) 111.

⁸⁰ Sharpe (n 23 above) 112.

⁸¹ Rankin (n 7 above) 407.

“expanded definition”.⁸² There has been some confusion about the nature of the “expanded definition” and the concepts of group RSD and *prima facie* RSD have thus been erroneously conflated.⁸³ It is essential to discuss these concepts in order to demystify the widely believed tendency of the “expanded definition” to “open the floodgates” of refugee protection in host countries.

a) Group Refugee Status Determination

The question of group RSD is closely connected to the debate of “objectivity versus subjectivity” of the “expanded definition”. This is a question that will be discussed in the subsequent chapter in detail. At the present moment, it is important to mention that the “expanded definition” acknowledges that there are events that cause large groups of people to flee. In that case, it is essential to carry out an objective study of the prevailing country conditions that force large-scale movements of people, necessitating group RSD. The high rates of mass influx heavily burden the individual refugee RSD procedures of host countries. Thus, individual RSD would be illogical and impracticable.⁸⁴ Group RSD serves the purpose of relieving the RSD system of host countries while still urgently extending refugee protection to those who are in desperate need of it.

b) Prima Facie Refugee Status Determination

The second point of contention is the *prima facie* RSD allegation. Since the “expanded definition” events force large groups or populations to migrate, several individuals flee for the same reasons. *Prima facie* RSD prevents replication of refugee claims and alleviates the refugee systems.⁸⁵ On objectively ascertaining the prevailing country conditions that trigger large-scale movements, *prima facie* RSD is crucial for vulnerable large groups to urgently receive refugee protection.

Group RSD and *prima facie* RSD are concurrently implemented. Sharpe acknowledges the impractical and financial difficulties of applying the individual RSD process to these large-scale movements, thereby warranting group RSD on a *prima facie* premise. She further states that *prima facie* RSD is the conferring of refugee status to individuals of the group on a presumptive basis.⁸⁶ That is to say that, as reiterated by Micah Bond Rankin, such individuals within the group are provisionally considered as refugees without following the entire refugee application procedure.⁸⁷ George Okoth-Obbo further explains that they cease to enjoy this presumptive refugee status once evidence to the contrary comes to light.⁸⁸ Implementing group RSD on a *prima facie* basis accords with the fundamental humanitarian aim of the 1969 OAU

⁸² C d’Orsi *Asylum Seeker and Refugee Protection in Sub-Saharan Africa: The Peregrination of a Persecuted Human Being in Search of a Safe Haven* (2016) 85.

⁸³ See Rankin (n 7 above) 416.

⁸⁴ UNHCR ‘Refugee Status Determination: Identifying who is a refugee’ (2005) 12.

⁸⁵ Rankin (n 7 above) 416.

⁸⁶ See Sharpe (n 23 above) 121.

⁸⁷ See Rankin (n 7 above) 416.

⁸⁸ Okoth-Obbo (n 70 above) 120.

Convention so as to prevent vulnerable people in need of refugee protection from being further exposed to the life-threatening conditions that they attempt to flee.

2.4 The Way Forward

The decolonisation process has posed harder challenges than expected. In fact, the increasing refugee predicament on the African continent is largely attributable to various conflicts in independent countries prevailing post-independence.⁸⁹ Issues contributing to forced migration are ‘the emergence of one party systems, military and minority regimes, extra-constitutional means of change of governments, internal armed conflicts or civil wars and broader conflicts or claims’.⁹⁰ The heightened refugee movements call for effective, relevant solutions to be implemented in order to alleviate the burden on refugee host countries while still affording refugee protection to those who need it.

While the “expanded definition” has been widely applauded as a unique mechanism providing refugee protection to those falling in the gaps of the 1951 Convention, its extent and function is still unclear and ambiguous.⁹¹ The lack of jurisprudence from the AU and its bodies to interpret the “expanded definition” undermines its potential to be applied in ever-changing, unique situations that arise.⁹² In the absence of such interpretive direction, many scholars have engaged with the “expanded definition” and the meaning of the four enumerated grounds.⁹³ It is the work of these scholars that is herein largely relied upon and debated in the following chapters. New, more complicated factors causing refugee movements on the continent have and will continue to cause refugee numbers to soar.⁹⁴ Therefore, it is impractical that the 1969 OAU Convention should operate with rigidity and inflexibility.⁹⁵ The innovativeness of the “expanded definition” should herein play an active role in resolving the new, unique, complex issues pertaining to refugees on the African continent. The focus of this paper is on poverty constituting a ground triggering forced movements on the African continent and hence, leading to the necessary extension of refugee protection for those affected by it. First, it is essential to understand the meaning and scope of “events seriously disturbing public order”, the “expanded definition” event under which this research paper will encompass poverty as such events.

⁸⁹ Oloka-Onyango (n 22 above) 454.

⁹⁰ Ladan (n 13 above) 248-249.

⁹¹ Wood (n 9 above) 556.

⁹² Rankin (n 7 above) 415.

⁹³ Sharpe (n 23 above) 112.

⁹⁴ Arboleda (n 55 above) 204.

⁹⁵ Arboleda (n 55 above) 201.

3. Chapter Two

Tamara Wood observes from the lack of judicial precedent in various African judiciaries and RSD decision-making tribunals,⁹⁶ that the ambiguity of the “expanded definition” has discouraged decision-makers from implementing it. Legal officers and other refugee advocates in South Africa have observed the inclination of South African refugee decision-makers towards the 1951 Convention refugee definition instead.⁹⁷ This reluctance to use the 1969 OAU Convention emerges throughout the continent. The praise that the 1969 OAU Convention has received over decades should not be undermined and unheeded. It was created to extend refugee protection to the vulnerable Africans not catered for under any of the grounds of the 1951 Convention refugee definition.⁹⁸ It should thus be activated to resolve the unique, constantly intensifying, ever-changing refugee crisis on the continent, thereby serving the purpose for which it was made.

3.1 Legal interpretation of the “expanded definition”

Effort must be invested in interpreting the “expanded definition”, thereby identifying its meaning and scope. The VCLT is the starting point in legally interpreting the “expanded definition”. The general rule of interpretation provides that it is in good faith that it should be interpreted. Contextual interpretation within its aim and purpose assists in understanding its ordinary meaning.⁹⁹ The preamble of the 1969 OAU Convention also provides guidance in identifying the purpose of the “expanded definition”.¹⁰⁰ The thread running through the preamble reveals the OAU’s context, aim and purpose as addressing the continuously rising numbers of refugees in Africa,¹⁰¹ in a humanitarian nature that reflects the significance of *Ubuntu*¹⁰² and unity among African states.¹⁰³

This spirit of *Ubuntu* seems to be the overarching approach adopted in the preamble. *Ubuntu*, a principal root of the existence and life of communities across the entire African continent, relates to the African philosophical notions of ‘tolerance and compassion.’¹⁰⁴ Its prevalence in the preamble of the 1969 OAU Convention reveals a commitment of OAU member states to resolve African refugee movements in an amicable manner that encompasses concern for fellow Africans fleeing undesirable, harmful living conditions. The “expanded definition” should thus be read through these lens of concern for and welcome of African refugees.

⁹⁶ See Wood (n 9 above) 561.

⁹⁷ Wood (n 9 above) 564.

⁹⁸ Rankin (n 7 above) 415.

⁹⁹ VCLT, article 31(1).

¹⁰⁰ VCLT, article 31(2).

¹⁰¹ 1969 OAU Convention Preamble, para 1.

¹⁰² 1969 OAU Convention Preamble, para 2 and 8.

¹⁰³ 1969 OAU Convention Preamble, para 3.

¹⁰⁴ J Broodryk *UBUNTU: Life lessons from Africa* (2002) 12.

Nonetheless, Sharpe expresses that the implementation of the general rule of interpretation does not shed sufficient light on the meaning and scope of the “expanded definition”.¹⁰⁵ This paper accords with Sharpe’s position on this matter. The general rule of interpretation does not ascertain the nature of events intended to be covered by the “expanded definition”. It is then imperative to turn to the supplementary tools of the interpretation. These include the subsequent drafts and other preparatory work of the 1969 OAU Convention and the circumstances under which the final draft was accepted and adopted.¹⁰⁶ Essentially, the rigorous process that led to the final 1969 OAU Convention illustrates the drafters’ motives to provide unique solutions for African refugee realities largely neglected by the 1951 Convention.¹⁰⁷ The emphasis on the specific issues of the African refugee discourse, as demonstrated in the title of the 1969 OAU Convention and reiterated by the drafters,¹⁰⁸ should direct and inspire an innovative, flexible interpretation of the “expanded definition”.

The failure of the general rule of interpretation to provide an interpretive framework could also be reconciled by ‘any subsequent practice’ used when applying the “expanded definition”.¹⁰⁹ This includes case law or interpretive guidance by the African judicial system. However, the absence of any such jurisprudence in Africa hinders the constructive interpretation of the “expanded definition”.¹¹⁰ The four enumerated grounds have also not been extensively determined and defined within international law.¹¹¹ The OAU took great strides in including the four specified grounds in the 1969 OAU Convention but its failure to provide interpretive direction to its member states has proven difficult for implementation of the “expanded definition”.

The rules of legal interpretation have failed to formulate and shape interpretive guidelines according to which member states of the OAU can implement in determining cases of any of the four grounds enshrined in the “expanded definition”. Henceforth, a handful of scholars have made exceptional attempts to interpret their scope and meaning.¹¹² Although there is still a significant amount of vagueness, they have paved the way forward in their differing discussions aimed at providing clarity thereof. The works of Alice Edwards, Sharpe, Rankin, Wood, Tal Hanna Schreier, MRK Rwelamira and Jennifer Klinck are the building blocks upon which this paper establishes the argument for the conceptualisation of poverty as a ground for refugee status.

The 1969 OAU Convention, and particularly the “expanded definition”, was established in the ambience of decolonisation and the rise of new, independent African states. With African states free from colonisation, would the grounds stipulated in the

¹⁰⁵ Sharpe (n 23 above) 141.

¹⁰⁶ VCLT, article 32.

¹⁰⁷ See Arboleda (n 55 above) 192 and 194.

¹⁰⁸ See Rankin (n 7 above) 407.

¹⁰⁹ VCLT, article 31(3)(b).

¹¹⁰ Rankin (n 7 above) 418.

¹¹¹ Sharpe (n 23 above) 112.

¹¹² Sharpe (n 23 above) 112.

“expanded definition” then still be applicable to the African refugee realities today? Okoth-Obbo views the “expanded definition” as a legal instrument that can still be compatible with present day refugee experiences on the continent.¹¹³ On the contrary, Sharpe echoes the idea that the emergence of independence and freedom on the continent brought to an end the occurrence of “external aggression”, “occupation” and “foreign domination”.¹¹⁴ The focus of this paper is not on the prevalence of these events but rather the present existence of “events seriously disturbing public order”. Sharpe holds that “events seriously disturbing public order” is a ground that is progressively gaining significance in Africa, thus necessitating interpretation.¹¹⁵ It is, hence, essential to ascertain the nature of events intended to be encompassed in the ground “events seriously disturbing public order”.

3.2 Subjectivity versus Objectivity

The debate around the subjectivity or objectivity of the “expanded definition” is important for the purpose of determining its nature and further, the nature of the phrase “events seriously disturbing public order”. Ousmane Goundiam, who served as the Director of the Legal Division of the United Nations Commission on Human Rights, shared the following sentiments with regards to this debate: the “expanded definition” confers refugee status to asylum seekers without prior substantiation of psychological fear of maltreatment. It requires an assessment of the objective circumstances occurring in the country, that is, the accumulative events compelling a large group of people to migrate. If the subjective enquiry is to be explored, it has usually played a mere secondary role to the objective one.¹¹⁶ The determination of whether or not the “expanded definition” is subjective or objective is a contested space amongst scholars, which this paper will attempt to now resolve.

Arboleda distinguishes the “expanded definition” from the 1951 Convention refugee definition and article I of the 1969 OAU Convention. He states that the 1951 Convention refugee definition and article I of the 1969 OAU Convention require the existence of calculated, prejudiced persecution while the “expanded definition” does not.¹¹⁷ This is translated into the result that while the 1951 Convention forces individuals or groups of individuals with similar characteristics to flee, the events in the “expanded definition” trigger large-scale movements due to intolerable, grave situations. Rwelamira has inferred, henceforth, that a test of objectivity is used to establish fear in the case of the “expanded definition”.¹¹⁸ Mere examination of reports about the harmful, life-threatening circumstances prevailing in the country of origin or nationality would demonstrate the necessitated cause of forced migration.

¹¹³ Rankin (n 7 above) 415.

¹¹⁴ Sharpe (n 23 above) 112.

¹¹⁵ Sharpe (n 23 above) 113.

¹¹⁶ Rankin (n 7 above) 411.

¹¹⁷ Arboleda (n 55 above) 195.

¹¹⁸ Rwelamira (n 3663 above) 559.

On the contrary, Rankin is among the scholars who advocate for a subjective approach to the “expanded definition”. Rankin raises concerns as to whether the mere occurrence of one of the “expanded definition” events suffices for the element of compulsion.¹¹⁹ Sharpe expands on Rankin’s criticism of using an objective approach. She states that the employment of a solely objective approach fails to take into consideration the fact that some features of the “expanded definition” require a subjective analysis.¹²⁰ The element of compulsion, as inferred by Rankin and advocated for later in this paper, is one such feature. This will be expanded upon in due course below.

However, does the subjective enquiry not further burden the process of the refugee system as individual assessments of massive populations would need to be made? The test of subjectivity herein does not require each applicant to perform the burdensome task of proving that he or she had no other option but to seek asylum in the host country.¹²¹ Rather, the subjective enquiry includes determination of various factors such as:

‘the individual circumstances of the asylum-seeker, including his or her location relative to the site of disturbance, the nature of disturbance and the possibility of the violence spreading to the area in which the asylum seeker resides, the credibility of his or her statements, any particular factors specific to the asylum-seeker, such as ethnicity, race, religion or political affiliations or opinions, or on the basis of fear.’¹²²

Therefore, the subjective enquiry herein is not an onerous, heavy task to be completed by the refugee applicant. While there must be explicit occurrence of a specific “expanded definition” event, to be ascertained objectively, a subjective enquiry according to the criteria set out above is equally important to determine compulsion to flee. The subjective and objective approaches must be implemented concurrently in the RSD process under the “expanded definition”.

3.3 Interpreting the “expanded definition”

Although the focus of this research is on the phrase “events seriously disturbing public order”, it is important to interpret other elements of the “expanded definition”. It is to operate as a whole and not in a piecemeal, fragmented way. Understanding the other features of the “expanded definition” is essential to ascertain the ambit and meaning of “events seriously disturbing public order”.

¹¹⁹ Rankin (n 7 above) 411.

¹²⁰ Sharpe (n 23 above) 114.

¹²¹ Edwards (n 21 above) 230.

¹²² Edwards (n 21 above) 230.

a) Events seriously disturbing public order

Regardless of Sharpe's acknowledgment of the ground "events seriously disturbing public order" being the most adaptable to the constantly changing refugee realities in Africa, the failure to provide an interpretive framework for it continues to leave the scope and meaning of this ground unclear.¹²³ Scholars have made the effort to interpret it and their different approaches have contributed towards understanding it.

i. "Public order": A multidisciplinary approach

Undefined under international law, Edwards notes that "public order" has commonly been employed in situations concerning the society's stability.¹²⁴ Chandan Sengupta states that political order, amongst other social determinants, is only one aspect that creates an environment conducive to stability.¹²⁵ Since political order essentially leads to the stability of a specific region or country, the comprehensive knowledge pertaining to stability could help with understanding the meaning of "public order". It will be important to discuss below the link between political order and public order.

Stability is commonly perceived to be of a political nature. 'Political instability and disorder' are evident where governmental control and systems are threatened and subdued by 'rapid social change and political mobilisation of new groups'.¹²⁶ Political stability is then 'defined...as the absence of civil wars, of coups (successful or attempts), of frequent constitutional changes, and of domestic political terrorism, corruption, and expropriation'.¹²⁷ However, this interpretation of stability does not differentiate between instability and tyrannical rule of dictatorial governments. Rather than combat prevalent instability, dictatorial governments may conceal any manifestations of such instability through various oppressive means, such as intimidation.¹²⁸ Hence, the absence of events triggering political instability does not necessarily mean that stability prevails. It is then imperative to perform an in-depth, comprehensive study of "stability".

The narrow definition of stability to include only events of a political nature¹²⁹ aligns with Sharpe's criticism of public order being taken to refer to only the political event of "armed conflict". This has the negative result of restricting the scope of the "expanded definition", which is contradictory to its humanitarian tone.¹³⁰ It is therefore imperative to examine both stability and public order through multidisciplinary lens, of which the sociological discipline will be of principal interest in this paper.

¹²³ Edwards (n 21 above) 215.

¹²⁴ Edwards (n 21 above) 217.

¹²⁵ Sengupta (n 30 above) 5101.

¹²⁶ Sengupta (n 30 above) 5101.

¹²⁷ RA Posner 'Equality, Wealth and Political Stability' (1997) 13 *Journal of Law, Economics and Organisation* 344.

¹²⁸ Posner (n 127 above) 345.

¹²⁹ Posner (n 127 above) 344.

¹³⁰ Sharpe (n 32 above) 15.

Sengupta appreciates that stability is not solely political but that it is rather a multi-dimensional socio-political phenomenon.¹³¹ A multidisciplinary approach herein requires a departure from a solely political focus of stability. With that said, the sociological discipline is more familiar with the use of social order rather than social stability,¹³² although these two concepts are closely related. Social stability is evident where there is an existing 'condition of freedom from social disorder'. Social order is not limited to the absence of political acts of violence and conflict, but also extends to include 'condition[s] of sustainable development and well-being'. Thus, 'poverty, hunger, exploitation, suicide, corruption, violence and other crimes' are examples of events that would then cause social disorder within a country.¹³³ This multidisciplinary approach gives a broad understanding of the multifaceted manifestations of instability. It reveals that while many African countries may enjoy political stability, social stability or order may not be a reality.¹³⁴ This expansive reading of stability accords with the humanitarianism of the 1969 OAU Convention and henceforth, encourages a wider interpretation of public order.

Having ascertained the meaning of stability through a multidisciplinary approach, a sociological approach to "public order" could also shed some light on its meaning, in the absence of its comprehensive legal definition. In terms of sociology, "public order" is made up of systems entrenched within the wider context of world events. These systems make up the whole social process of the world, that is, various aspects of interaction amongst people.¹³⁵ Interactions occur at the global, regional, national and local levels. '[P]articipants in the world social process' either act independently or in collaboration with others who share the 'same symbols of common identity and ways of life of varying degrees of elaboration.' In either case, the core goal of participants is 'the maximisation of values within the limits of capability.'¹³⁶ These goal values are concerned with the respect and fulfilment of fundamental values of 'human dignity or a free society', which are inherited from the world's various remarkable democratic movements. Today, they are expressed in 'the United Nations Charter, the Universal Declaration of Human Rights 1948 (UDHR), the International Covenant on Civil and Political Rights 1966 (ICCPR) and its Protocol and the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR)'. These values are further raised at regional, national and local levels to suit the various cultural contexts.¹³⁷

The respect and protection of human rights are of crucial concern in various decision-making processes at the different levels of the social interactions.¹³⁸ In light of the respect and protection of human rights, earlier demands made by participants of the social process were primarily for the fundamental civil freedoms. '[I]ndustrialisation,

¹³¹ Sengupta (n 30 above) 5102.

¹³² Sengupta (n 30 above) 5102.

¹³³ Sengupta (n 30 above) 5103.

¹³⁴ Sengupta (n 30 above) 5104.

¹³⁵ McDougal and Lasswell (n 35 above) 10.

¹³⁶ McDougal and Lasswell (n 35 above) 11.

¹³⁷ McDougal, Lasswell and Chen (n 19 above) 90.

¹³⁸ McDougal, Lasswell and Chen (n 19 above) 367.

massive concentration of wealth, improving urbanisation, accelerating change and the attendant ills of exploitation, disparities in wealth distribution, unemployment, inadequate housing, medical care, education, skills,' amongst many other forces at work have largely changed the nature of new demands. These fairly new demands include but are not limited to 'fair and adequate wages, basic income, improved working and health conditions, access to education and skills acquisition, and protection against the hazards of unemployment [and] old age.'¹³⁹ Although these demands may take different shapes in different cultural and socioeconomic contexts, public order requires the increased protection of all those fundamental human rights, normally distinguished 'as those of human dignity'.¹⁴⁰

McDougal and other scholars mention seven common demands within public order. They relate to power, wealth, rectitude, enlightenment, respect, affection, skill and well-being.¹⁴¹ Of particular concern herein and to be further expounded, are the demands relating to wealth and well-being.

Firstly, the demands with respect to wealth are aimed at ensuring 'a basic minimum of benefits from the wealth process, [such as] a guaranteed income, social security and abolition of poverty'. It also includes 'freedom from deprivations of wealth' even in the midst of a crisis.¹⁴² Deprivations in this regard include but are not limited to the persistence of poverty, widespread unemployment and excessive inflation.¹⁴³

The second demand relates to the well-being of the participants of the social process. Demands entailed herein include, but are not limited to 'the right to life, the core 'minimum in safety, health and comfort', an environment that encourages 'survival and development' and the implementation of suitable solutions for the 'prevention, deterrence, restoration, rehabilitation, reconstruction and correction of health.'¹⁴⁴ Demands pertaining to well-being are deprived by various factors, such as the prevalence of 'disease and hunger (starvation)', 'high mortality rate and low life expectancy', insufficient 'provision for safety, health and comfort', persistence of transferrable diseases, insufficient 'medical care and services' and 'poor and overcrowded housing and other living conditions, such as poor sanitation'.¹⁴⁵ This sociological approach provides a more helpful understanding and framework for public order than the tools of legal interpretation.

ii. "Public order": The approach of various scholars

Various scholars have explored the concept of "public order" in its application to the African refugee discourse. Schreier refers to Jayawickrama's work on "public order",

¹³⁹ McDougal, Lasswell and Chen (n 19 above) 5-6.

¹⁴⁰ McDougal, Lasswell and Chen (n 19 above) 6.

¹⁴¹ McDougal and Lasswell (n 35 above) 11.

¹⁴² McDougal, Lasswell and Chen (n 19 above) 11.

¹⁴³ McDougal, Lasswell and Chen (n 19 above) 31 and 32.

¹⁴⁴ McDougal, Lasswell and Chen (n 19 above) 10-11.

¹⁴⁵ McDougal, Lasswell and Chen (n 19 above) 26-29.

who defines it as ‘public peace, safety and tranquillity.’ Hence, it goes beyond ensuring ‘ordinary maintenance of law and order.’ Furthermore, it denotes that there should be no violence and that the state of affairs should be conducive for people to lead lives of normalcy.¹⁴⁶ Without coming to a conclusion, Sharpe merely states that “public order” relates to ‘administrative, social, political and moral order.’¹⁴⁷

Values and demands relating to the wealth and well-being of members of society ought to be respected, protected and promoted by government, its various organs, members and groups of society.¹⁴⁸ Rankin further adds onto this aspect of the sociological approach, in that public order should not only be conceptualised in terms of threats but must also take cognisance of State obligations to afford citizens enjoyment of fundamental rights. In exercising its public powers, the State must respect its citizens’ human rights.¹⁴⁹

iii. Nature of events

The stipulation of “events” signifies the requirement of the repeated occurrence of multiple events rather than one event that will unlikely occur again.¹⁵⁰ Where the events in questions pose a threat to the realisation and protection of human rights from which there can be no derogation,¹⁵¹ it is found that public order would have been seriously disturbed. Among the list of non-derogable rights is the right to life.¹⁵² The demands relating to wealth and well-being are concerned with this fundamental right to life. Furthermore, deprivation of these demands must be widespread in order to suffice for the standard of serious disturbance to public order, that is, posing a threat to an undefined category of people or disturbing society generally.¹⁵³

While the 1951 Convention refugee definition focuses solely on the violation of civil and political rights, there is no reason why the phrase “events seriously disturbing public order” should not also include socioeconomic rights. Michelle Foster argues for the inclusion of socioeconomic rights under the 1951 Convention refugee definition, as she realises that the government may perpetuate socioeconomic violations as a means of political repression. Hence, she doubts the ease and ability to differentiate civil and political rights from socioeconomic rights.¹⁵⁴ The sociological approach to public order recognises the UDHR as an expression of fundamental ‘values of human dignity or a free society’.¹⁵⁵ The UDHR entails both civil and political rights¹⁵⁶ and

¹⁴⁶ See Unpublished: TH Shreier Unpublished ‘A Critical Examination of South Africa’s application of the expanded definition: Is adequate protection being offered within the meaning of the 1969 OAU Refugee Convention?’ unpublished minor dissertation University of Cape Town (2008) 24-25.

¹⁴⁷ Edwards (n 21 above) 220.

¹⁴⁸ McDougal, Lasswell and Chen (n 19 above) 4.

¹⁴⁹ Rankin (n 7 above) 425.

¹⁵⁰ Edwards (n 21 above) 220.

¹⁵¹ See Rankin (n 7 above) 427.

¹⁵² UN doc. CCPR/C/21/Rev.1/Add.11 para 7.

¹⁵³ Rankin (n 7 above) 413.

¹⁵⁴ Foster (n 45 above) 10.

¹⁵⁵ McDougal, Lasswell and Chen (n 19 above) 11.

¹⁵⁶ Universal Declaration of Human Rights 1948. For example, see articles 10,11, 12 and 13.

socioeconomic rights.¹⁵⁷ Furthermore, the fact that both the ICESCR and the ICCPR and its Protocol are expressions of these basic values, civil and political rights and socioeconomic rights must be accorded equal importance. Civil and political rights and socioeconomic rights are indivisible, interdependent and interrelated.¹⁵⁸ Therefore, there should be equal concern for the realisation of the fundamental values that are related to socioeconomic rights just as to civil and political rights.

While it cannot be every event that can be said to disturb public order, what extent of harm is required to constitute a disturbance to public order? The “expanded definition” requires such harm to be serious. Rankin stipulates that there must be a broad contravention of key human rights¹⁵⁹ and Edwards further qualifies that such events must be persistent, widespread or endangering to the life, liberty or security of large populations.¹⁶⁰ Clearly, what is required is more than emotional affliction.¹⁶¹ Therefore, the gravity of harm goes beyond subjective harm of individuals to mean the scope of disturbance on society as a whole. This demonstrates the invasion of peace and tranquillity of an entire community and not just an individual.¹⁶² A solely subjective enquiry would open the door too wide for varying degrees of harm on individuals in the absence of sufficiently dangerous events that threaten the lives, liberty and security of the community in general. Hence, group RSD on the basis of *prima facie* RSD suggests an objective assessment of these events in the specific region or country of origin as the starting point to determine the gravity of disorder.

This test of objectiveness assesses the discrepancy between the ‘[extent] and intensity of the [events in question] and the degree and nature of peace [normally] expected to prevail in a given [country] at a given time.’¹⁶³ Where the intensity and degree of the events exceeds what is normally expected to prevail as peace, the government has the role and obligation to address such events. The South African Refugee Appeal Board (the Board) delivered a judgment with regards to this ground in a 2009 decision concerning an appellant from the Democratic Republic of Congo (DRC). It found that the unwillingness or inability of the government to extend protection to its citizens in the face of a breakdown in law and order suffices as “events seriously disturbing public order”.¹⁶⁴ This echoes the fact that public order is concerned with the government’s obligations.¹⁶⁵

Jennifer Klinck first necessitates widespread violence and deprivations of human rights to be resolved within the country, with or without the assistance of the government and even if the government is the perpetrator. International political

¹⁵⁷ UDHR. For example, see articles 22, 23, 24, 25 and 26.

¹⁵⁸ Foster (n 45 above) 13.

¹⁵⁹ Rankin (n 7 above) 426.

¹⁶⁰ Edwards (n 21 above) 220.

¹⁶¹ Rankin (n 7 above) 424.

¹⁶² Schreier (n 146 above) 24.

¹⁶³ Rankin (n 7 above) 424.

¹⁶⁴ See Wood (n 9 above) 565.

¹⁶⁵ Rankin (n 7 above) 425.

pressures through supporting 'civil society action' and employment of international political pressures, like sanctions, are such mechanisms of encouraging change in the country. Nonetheless, should nothing change and lives are further threatened and endangered, seeking asylum in another country is pertinent and becomes the next alternative.¹⁶⁶ However this paper does not take Klinck's position herein. People should not be subjected to living in life-threatening conditions while awaiting international aid.

More so, international political pressures are likely to only lead to further deterioration of the country conditions and further threats to people's survival. Rather, the position of this paper is reflected in a South African case of a Nigerian appellant before the Board. It qualified that regardless of the sincerity of the government to combat the events seriously disturbing public order, the wide-scale violence and contravention of human rights may still persist. Consideration of the effectiveness of the efforts made by government to stop the events in question is imperative.¹⁶⁷ Such government's loss of authority or ineffectiveness is sufficient to warrant refugee movements, with or without international political pressures.

b) In either part or whole of his country of origin or nationality

Even if the first three grounds of the "expanded definition", that is 'external aggression, occupation and foreign domination' occur in one specific region of the country, their effect is widely felt across the entire country.¹⁶⁸ On the contrary, "events seriously disturbing public order" prevailing in a specific region may not be felt in all parts of the country. Thus, if such events occurred from too far a distance from the refugee applicant, he or she would not be able to prove any harm or peril suffered as a result of the events in question.¹⁶⁹ This aspect is closely related to the requirement of compulsion, to which this paper now turns.

c) Compelled to leave his place of habitual residence

Edwards expresses that compulsion reveals an individual's reasoning to flee from objectively determined "events seriously disturbing public order". Compulsion is concerned with the establishment of causation between the individual and the event, thereby ensuring that there is a geographic nexus.¹⁷⁰ A refugee applicant could thus merely have to prove their normal residence in the region gravely affected by the events seriously disturbing public order.

¹⁶⁶ JA Klinck 'Recognising Socioeconomic Refugees in South Africa: Principled and Rights-Based Approach to Section 3(b) of the Refugees Act' (2009) 21 *International Journal of Refugee Law* 673.

¹⁶⁷ Schreier (n 146 above) 54.

¹⁶⁸ Sharpe (n 23 above) 119.

¹⁶⁹ Rankin (n 7 above) 434.

¹⁷⁰ Edwards (n 21 above) 229.

4. Chapter Three

World hunger has been constantly increasing in the past three consecutive years from 2015 to 2017. Levels of chronic undernourishment have risen from roughly 804 million in 2016 to almost 821 million in 2017. These statistics are a reflection of the intensifying perpetuation of undernourishment. Africa has remained high on the global chart herein, with an increase of undernourishment from 19.7% in 2016 to 20.4% in 2017.¹⁷¹ The inadequate standard of living in Africa is another challenge to the enjoyment of lives free from poverty. An alarming number of 2.1 billion people across the continent lack access to domestic potable water, while 844 million people lack 'access to basic water supply' entirely. In fact, 159 million people still source water from 'untreated...rivers, streams or lakes'. Thereby sanitation levels are bound to be deplorable. 829 million people eliminate waste outdoors in unhygienic ways and sanitation levels are at their worst in particularly Sub-Saharan Africa and Oceania, where population growth is ever on the rise. As a result, 2.6 million people die annually because of such a poor standard of living.¹⁷²

Life expectancy in Africa in 2018 is, at the present moment, very low due to the prevalence of various communicable and non-communicable diseases. An average estimate of life expectancy for women in Africa is 64 years against 74 years globally. With regards to men, in Africa, it is 61 years as compared to 70 years globally.¹⁷³ In the face of such devastatingly dire conditions on the African continent, the purpose of this chapter to justify poverty as a ground for refugee protection. The sociological approach to public order and the work of the various scholars on the meaning of the ground "events seriously disturbing public order", discussed in depth in the prior chapter, provides the route that this argument pursues.

The poor economic conditions prevailing across the African continent have necessitated efforts from governments to safeguard and uphold human rights. Such human rights include 'the human right to life, the human right to a standard of living adequate for health and well-being (including adequate food, water, sanitation, and housing and access to health and social services), and the human right to education.' These rights are appreciated as 'ethical, legal, political and economic' essentials for survival and progress in the 21st century. Poverty, recognised and named as the worst human rights issue in the world today, poses grave abuse and denial of these important human rights.¹⁷⁴ While various African constitutions and governmental efforts have attempted to address the issue of poverty hindering the protection and promotion of human rights, the reality speaks quite the opposite.

2008 marked unmatched levels of socio-political turmoil in Zimbabwe. This upheaval in turn, triggered economic instability, with the rate of inflation soaring at 231 million

¹⁷¹ Food and Agriculture Organisation of the United Nations (n 1 above) 2-4.

¹⁷² Solidarites International (n 2 above) 6.

¹⁷³ Statista (n 3 above).

¹⁷⁴ Vizard (n 43 above) 2.

per cent annually. Food insecurity, cash shortages and price escalations were only few of the features of what became the normal Zimbabwean life. Effectively, the standard of living significantly dwindled.¹⁷⁵ In the face of such life-threatening circumstances, Zimbabweans fled in large numbers, and attempted to seek asylum in the neighbouring South Africa. With the lack of interpretive guidance explaining the four grounds of the “expanded definition”, the UNHCR refused to grant refugee status to these Zimbabweans.¹⁷⁶ Considering the life-threatening circumstances that Zimbabweans were subjected to, this could have served as an opportunity for the UNHCR, the AU and the South African government to interpret the “expanded definition” and incorporate poverty as a ground amounting to “events seriously disturbing public order”.

4.1 Defining Poverty

The first crucial step is to identify the most appropriate definition of poverty for this paper. Different definitions of poverty distinguish as poor different individuals and groups. Essentially, they adopt different interpretations of ‘a good society and good lives’.¹⁷⁷ Hence, it is indispensable to adopt an approach to poverty that will provide the most suitable conceptual framework upon which poverty can be hypothesised as a ground for refugee status. While it appears attractive and simple ‘to define poverty as non-fulfilment of any kind of human right’, it would obscure the line that differentiates poverty from mere ‘non-fulfilment of human rights’. Not all instances of non-fulfilment of human rights, regardless of the gravity thereof, can be encompassed as poverty.¹⁷⁸ This must be kept in mind while comparatively discussing the monetary approach, the social exclusion (SE) approach, the participatory poverty assessment approach (PPA) and the capability approach and thereafter determining which one is most suitable for this paper. The approach that best distinguishes poverty from non-fulfilment of human rights should be preferred and pursued.

Firstly, the monetary approach, formulated at first for application in developed countries,¹⁷⁹ is the approach used most frequently. This approach describes poverty in relation to the shortage ‘in consumption (or income) from some poverty lines’.¹⁸⁰ Its assessment of individualistic deprivation neglects the impact of resource distribution within households on the individual’s enjoyment of and access to resources.¹⁸¹ This individualistic focus shifts the focus from the determination of the causes of poverty.¹⁸² In addition, the approach’s prioritisation on the increase of monetary incomes does not take into account social resources, which directly influences the degree of ‘individual

¹⁷⁵ T Kondo ‘Socio-economic Rights in Zimbabwe: Trends and Emerging Jurisprudence’ (2017) 17 *African Human Rights Law Journal* 164.

¹⁷⁶ Wood (n 9 above) 577.

¹⁷⁷ Laderchi, Saith and Stewart (n 18 above) 24.

¹⁷⁸ OHCHR ‘Human Rights and Poverty Reduction: A Conceptual Framework’ (2004) 5.

¹⁷⁹ Laderchi, Saith and Stewart (n 18 above) 244.

¹⁸⁰ Laderchi, Saith and Stewart (n 18 above) 247.

¹⁸¹ Laderchi, Saith and Stewart (n 18 above) 251 and 252.

¹⁸² Laderchi, Saith and Stewart (n 18 above) 269.

achievements in some fundamental [aspects] of human well-being, such as health and nutrition.¹⁸³ The monetary approach's failure to illustrate the causes of poverty leads to the inability to demonstrate the gravity of those events and hence, justify poverty as ground for refugee status under the ground "events seriously disturbing public order". With this approach having been conceptualised for application in developed countries, there are doubts as to its application in Africa, which is made up of developing countries.

Secondly, the SE approach was also primarily devised for application in developed,¹⁸⁴ industrialised countries. This approach is concerned with addressing marginalisation and deprivation¹⁸⁵ by dismantling exclusionary institutional and societal structures through policies aimed at, for example, redistribution and anti-discrimination.¹⁸⁶ The European Union has adopted the SE approach as a fundamental feature of its social policy, describing it as partial or whole exclusion of individuals or groups from fully engaging in the activities of society.¹⁸⁷ This raises the doubt of the SE approach's application to developing countries, where the majority of the population are largely excluded from participating in the societies in which they live, or where there may be no vast inequalities amongst people in society.¹⁸⁸ Poverty in Africa is wide-scale and endured by the overwhelming majority of Africans, making this approach inapplicable to Africa.

The third approach, known as the PPA, was formulated as an objective to address poverty in developing countries.¹⁸⁹ The main feature of this approach is to include the poor in decision-making processes, where they would play an active role in defining poverty and identifying its gravity on their lives and livelihoods.¹⁹⁰ However, in reality, it is outside experts who evaluate and interpret results in respect to poverty, giving only limited influence to the opinions of poor people themselves.¹⁹¹ In addition, the PPA entails a rigorous, demanding process that is likely to involve only a small proportion of the population, erroneously reflecting the entire population of the country.¹⁹² Henceforth, the flaws in the PPA render it inapplicable in order to sufficiently ascertain the causes of poverty in Africa. Experts are unable to effectively portray the experiences of the poor and the involvement of only a few in the process excludes the voices of the very poor and marginalised.

This leaves the capability approach, which was established by Amartya Sen. This approach defines capability poverty as the inability of people to lead lives 'that are

¹⁸³ Laderchi, Saith and Stewart (n 18 above) 252.

¹⁸⁴ Laderchi, Saith and Stewart (n 18 above) 244.

¹⁸⁵ Laderchi, Saith and Stewart (n 18 above) 257.

¹⁸⁶ Laderchi, Saith and Stewart (n 18 above) 269.

¹⁸⁷ See Laderchi, Saith and Stewart (n 18 above) 257.

¹⁸⁸ Laderchi, Saith and Stewart (n 18 above) 259.

¹⁸⁹ Laderchi, Saith and Stewart (n 18 above) 245.

¹⁹⁰ Laderchi, Saith and Stewart (n 18 above) 260.

¹⁹¹ Laderchi, Saith and Stewart (n 18 above) 261.

¹⁹² Laderchi, Saith and Stewart (n 18 above) 262.

universally accepted as fundamental for human development'.¹⁹³ The capability approach's definition of poverty with regards to lives and liberties that people enjoy has been recognised as an invaluable contribution to the poverty discourse. The capability approach is preferred over the monetary approach for two reasons: firstly, for revealing causes of poverty on a much broader scale; and secondly, drawing attention away from the sole focus of private monetary resources, which fails to recognise the impact of disregarding social goods and thereby adopts a limited perception of human well-being.¹⁹⁴ Hence, the commonly used monetary approach does not provide an effective and efficient approach to poverty as does the capability approach. The capability approach to poverty is thus the optimal approach to be applied herein. It is necessary to further explore this approach in order to locate the argument of the paper within the capability approach.

Understanding poverty as a social problem requires 'a link with deprivation caused by economic constraints'.¹⁹⁵ The monetary approach focuses solely on economic restraints. The SE approach is concerned with deprivation not caused by economic limitations, but rather, marginalisation and exclusion. The PPA does not address either of these aspects of deprivation or economic restrictions. However, the capability approach fulfils both requisites of deprivation and economic restraints.¹⁹⁶ The capability approach goes beyond mere non-fulfilment of human rights to further give rise to poverty. Therefore, this limits who is identified as poor for purposes of refugee protection. The capability approach is most suitable for application in this paper.

4.2 Amartya Sen: Freedom from Poverty and Capability Deprivation

At a most basic understanding, poverty is perceived as 'lowness of income', signifying that income is key to the enjoyment of a satisfactory quality of life. 'Improved basic education and healthcare' have a direct impact on the 'quality of life [and] ability to earn an income', which sets people free from poverty. The evaluation of the extent to which income enables access to goods and services essential for fulfilment of their needs must be carried out in light of the respective natural and social contexts. Factors to be considered include age-sensitive needs, respective environmental dynamics influencing dietary and other requirements necessary for the fulfilment of individuals' needs, 'the cost of the locally cheapest way of meeting these requirements in a culturally acceptable way, and the amount of labour necessary to gain access to those required goods and services'.¹⁹⁷ Evidently, in fully appreciating the lowness of income, it is vital to understand poverty as multidimensional, with multifaceted features and resulting effects that it has on a community, and further, on the continent.

¹⁹³ Laderchi, Saith and Stewart (n 18 above) 268-269.

¹⁹⁴ Laderchi, Saith and Stewart (n 18 above) 257.

¹⁹⁵ OHCHR (n 178 above) 6.

¹⁹⁶ OHCHR (n 178 above) 6.

¹⁹⁷ T Pogge 'How World Poverty is Measured and Tracked' in E Mack, M Schramm et al (ed) *Absolute Poverty and Global Justice: Empirical Data – Moral Theories – Initiatives* (2009) 63.

Nonetheless, adopting a solely income-based approach of poverty gives a fragmented picture of poverty. In order to have a broad and in-depth understanding of poverty, it is additionally important to consider 'poverty as a deprivation of basic capabilities'.¹⁹⁸ It highlights the life-threatening impact of poverty on vulnerable African people. Concepts of 'freedom from poverty' and 'poverty as capability deprivation' are henceforth, necessary to discuss.

a) Freedom from Poverty

Although Sen does not use a rights-based language in his capability approach, the fulfilment of human rights leads to the enjoyment of the essential freedoms that he lists. According to his approach, the extent of enjoyment of these human freedoms influences 'the goodness of social arrangements'. Human freedom thereby connects the two conceptions of non-fulfilment of human rights and poverty, allowing poverty to be perceived within the human rights discourse.¹⁹⁹

Since Sen's definition of poverty extends beyond low incomes to include deprivation of basic capabilities, then poverty relates to various 'denials of the full range of civil, political, economic, social and cultural rights'. In that way, violation of the right to food imposes on the enjoyment of adequate nourishment through perpetuation of hunger, malnutrition or starvation.²⁰⁰ Violations of sufficiently grave degree of the rights to health, housing, sanitation, water and work could amount to poverty as they may deprive enjoyment of the freedoms to sufficient nourishment, normal life spans and adequate living standards.

Socioeconomic rights, unlike civil and political rights that are realised immediately, are rather to be realised on a progressive basis. This is due to the fact that their realisation is largely dependent on the availability of government resources.²⁰¹ Nonetheless, this does not take away from the significance of 'freedom from severe poverty' being high on the agenda of human concerns.²⁰² While governments, and particularly African governments, lack sufficient resources to take steps towards progressively realising socioeconomic rights and reducing poverty, they must still create conditions conducive to the enjoyment of freedom from poverty. The work of Sen, a well-renown and respected scholar within the poverty discourse, is invaluable to the discussion of freedom from poverty and, to a large extent, this paper. While appreciating its

¹⁹⁸ A Sen *Development as Freedom* (1999) 20.

¹⁹⁹ OHCHR (n 178 above) 6.

²⁰⁰ Centre for Economic and Social Rights 'Human Rights and Poverty: is poverty a violation of human rights?' in *Human Rights Insights* last accessed on 1 November 2018 at http://www.cesr.org/sites/default/files/CESR_Briefing_-_Human_Rights_and_Poverty_-_Draft_December_2009.pdf 4-5.

²⁰¹ L Chenwi 'Unpacking "progressive realisation", its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance' (2013) 39 *De Jure* 749.

²⁰² Pogge (n 4 above) 11.

multifaceted, varied and complex nuances, Sen describes freedom by identifying the following features.²⁰³

Firstly, the process of freedom entails the determination of whether or not an individual can freely and solely take decisions. In this regard, it is important to consider if others interfere in the decision-making process and to distinguish the extent of independence in arriving at decisions. The second element is the opportunity of freedom. In reality, does an individual have the freedom to attain what they have 'reasons to value and want'? In responding to this second element, one must bear in mind 'the nature and [ambit (or sufficiency)] of the opportunities offered' as well as the link between the opportunities offered and the individual's aims and ambitions.²⁰⁴ All human beings, regardless of their social status, must enjoy freedom from poverty. Thomas Pogge identifies 'access to safe food and water, clothing, shelter and basic medical care' as basic essentials for all human beings to not only survive and exist but also to lead quality lives.²⁰⁵ Freedom, as described by Sen, is thereby concerned with the quality of life that one has the freedom to experience in reality and in their respective context.

b) Poverty as 'Capability Deprivation'

The notion of freedom from poverty must be understood within the broader picture of poverty as 'capability deprivation'. This is to say that poverty must be perceived alongside the concept of "impoverished lives' and deprivations in the basic freedoms that people can and do enjoy'. Sen identifies the following freedoms: freedoms 'to be [sufficiently] nourished, to enjoy [satisfactory] living conditions, to lead [lives of normal life expectancy] and to read and write'.²⁰⁶ However, broadening the ground of poverty to include an expansive variety of capabilities would open the gates of refuge too wide and further unduly burden refugee systems of host countries. It is important to distinguish extreme deprivation, that is, capability deprivations of fundamental freedoms, as poverty. Although freedoms vary from context to context and it may be difficult to ascertain common basic freedom,²⁰⁷ this paper will focus on the freedoms to be sufficiently nourished, enjoy adequate living standards and lead lives of a normal lifespan. These three directly affect the life, liberty and security of individuals, as required as a standard for serious disturbance to public order.

Poverty is prevalent on the African continent due to numerous, cumulative factors. Firstly, interactional harms refer to the preventable conduct of people that causes the foreseeable denial of others' livelihoods.²⁰⁸ Secondly, omissions refer to the failures of various agents to alleviate poverty even if they played no role in its conception or perpetuation.²⁰⁹ Lastly, a myriad of social institutions, such as rules administering

²⁰³ Vizard (n 43 above) 67.

²⁰⁴ Vizard (n 43 above) 67.

²⁰⁵ Pogge (n 4 above) 11.

²⁰⁶ Vizard (n 43 above) 3.

²⁰⁷ OHCHR (n 178 above) 7.

²⁰⁸ Pogge '(n 4 above) 16.

²⁰⁹ Pogge (n 4 above) 18.

various economic relations, play a major role in further exposing people to poverty.²¹⁰ Poverty is thereby the simultaneous, collective cause of these various factors.

Poverty is herein understood as ‘capability deprivation’ if rampant starvation and malnutrition, including prolonged malnutrition, affect the freedom to be sufficiently nourished. Secondly, the lack of access to ‘adequate shelter, housing and sanitation’ impede upon ‘the freedom to enjoy [acceptable] living conditions’. Many are without housing at all while others reside in slums or in overcrowded and poor-quality housing that normally has contaminated, insufficient ‘water, hygiene and sanitation’ facilities. Living under such dire conditions further exposes people to grave environmental circumstances and dangers, for example, ‘climate change [and] urban air pollution’.²¹¹

‘Premature mortality or excess morbidity’ hinder enjoyment of the freedom to lead lives of normal life expectancy. Various factors contribute to the constant, frequent and widespread occurrence and increase of preventable mortality and morbidity. These include the inability to ‘access basic resources, goods and services’ pivotal to the preservation of human life and promotion of progress, as well as insufficient nutrition, undrinkable water and the spread of diseases.²¹² Perpetuation of poverty continues in communities in all corners of the African continent at alarming, intensifying levels. This is a cause of concern, especially since violation has the acute effect of posing dangerous, life-threatening conditions on vulnerable Africans.

4.3 Conceptualising poverty as a ground for “events seriously disturbing public order”

Africans, and other vulnerable people in other parts of the world, have been constantly subjected to lives of poverty, and its intensifying pervasiveness has caused innumerable deaths. Quite evidently, poverty should be weighted as dangerous as physical violence²¹³ for its possible resulting in death. Therefore, it is crucial to fully appreciate poverty for its life-threatening effects. It is further important to realise that poverty is multidimensional, caused and exacerbated by ‘economic...political, social, cultural, geographic or climatic’ factors. Thereby, one is able to recognise that poverty is attributed to various factors that cause simultaneous subjugation and inequality.²¹⁴ This is consistent with Sharpe’s multi-dimensional idea of public order. Its widespread prevalence on the African continent stunts human development and may even reverse any development made on the continent. This causes a significantly large majority of Africans to fall into poverty and their survival to be threatened.

²¹⁰ Pogge (n 4 above) 25.

²¹¹ Vizard (n 43 above) 3 and 4.

²¹² Vizard (n 43 above) 4-5.

²¹³ M Fleurbaey ‘Poverty as a Form of Oppression’ in T Pogge *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (2007) 141.

²¹⁴ E Mack ‘Justice for the Poor – A Global Paradigm in Progress and Dispute’ in E Mack et al (ed) *Absolute Poverty and Global Justice: Empirical Data – Moral Theories – Initiatives 2*.

Just as doubt has arisen as to the relevance of the “expanded definition” in current day Africa, the Cartagena Declaration has received some criticisms for its continued relevance in the Americas today. Nonetheless, there is general consensus amongst Latin American States that current democratic governments are unstable, and that although the occurrence of political violence and systematic human rights abuses have declined, they still exist. While the Americas have experienced economic growth, innumerable people endure dire conditions of poverty, worse than those prevailing before revolutions took place on the continent.²¹⁵ Large populations in Latin America suffer from constantly rising levels of unemployment, lack of access to land, limited access to education, intensifying levels of corruption and very poor infrastructure amongst many other dire conditions. Henceforth, the search for a better life free from poverty largely contributes to the reasons for seeking asylum outside of State borders.²¹⁶ The Cartagena Declaration ought to be generously interpreted in order to provide the necessary protection to such forcibly displaced people. The similar conditions in Africa warrant humanitarian extension of refugee protection.

The simultaneous deprivations of freedoms to enjoy adequate nourishment, satisfactory living conditions and normal life expectancy prevailing in one country, as is usually the case in Africa, amounts to the satisfaction of the requirement of widespread, cumulative, numerous events.²¹⁷ However, not all those that experience these deprivations should be considered to be poor for the purpose of being granted refugee status under the ground “events seriously disturbing public order”. Considering the high levels of poverty in Africa, this would open the gates of refuge too wide and place extreme burden on host countries. While it is imperative to be economically restrained, lowness of income is not the only factor to prove such. The requirement is that there must broadly be insufficient control over economic resources. In addition to lowness of income, refugees considered to be fleeing poverty must also prove ‘insufficient command over publicly provided goods and services, inadequate access to communally owned and managed resources, inadequate command over resources that are made available through formal and informal networks of mutual support’ and so on.²¹⁸ Lack of control over various economic resources merely plays a complementary role that justifies poverty as a ground for “events seriously disturbing public order”.

Another factor that aggravates conditions of poverty is discrimination on any one or more of the grounds of ‘gender, ethnicity, or any other ground’ that causes exclusion and marginalisation and, in turn, affects the ability to access resources.²¹⁹ In ascertaining the granting of refugee status on the ground of poverty based on “events seriously disturbing public order”, this marginalisation, exclusion, and lack of control over resources should be viewed as accumulative factors that cause the grave, life-

²¹⁵ Arboleda (n 55 above) 99.

²¹⁶ Arboleda (n 55 above) 97.

²¹⁷ See Rankin (n 7 above) 411.

²¹⁸ OHCHR (n 178 above) 8.

²¹⁹ OHCHR (n 178 above) 8.

threatening condition of poverty. The 1951 Convention refugee definition would not be applicable herein as it is insufficient to claim, for example, that all women in a specific region or country are poor. A woman refugee applicant would need to show lowness of income in addition to the discrimination.

The preferred reliance of the 1951 Convention refugee definition by decision-makers in Africa is a cause for concern. The grounds upon which the 1951 Convention refugee definition affords refugee protection relate to the freedoms associated with civil and political rights. What about freedoms to enjoy sufficient nourishment, adequate living standards, lead lives of normal life expectancy and to read and write which relate to socioeconomic rights? Sen argues that violation of such freedoms can equally occur through the failure to afford adequate opportunities enabling people to achieve their basic needs.²²⁰ Just as the UDHR acknowledges that civil and political rights and socioeconomic rights are indivisible, interdependent and interrelated,²²¹ so too does the African Charter.²²² This should be translated into the African refugee discourse, such that poverty should be realised for its grave and violent effect on the wellbeing and survival of people on the continent. It should be further recognised as a growing cause of forcible displacement in Africa, from which refugee law should extend protection.

Globalisation and international trade, forms of social institutions, are not only unfair to poor, developing countries. They also perpetuate poverty. Policy makers erroneously view them as inescapable, unintentional and unavoidable. Yet, their decisions support globalisation and government officials enforce rules at 'international trade negotiations' that prioritise their national interests at the expense of the poorer, developing countries.²²³ While the government has limited control in combatting the effects of such social institutions,²²⁴ the standard of "events seriously disturbing public order" still requires that government demonstrates a willingness to restrain the serious disturbance to public order.²²⁵ Where the government does implement measures to suppress the serious disturbance, the effectiveness of its efforts must be ascertained.²²⁶ Should the harms posed by the social institutions persist nonetheless and the affected respective asylum seekers can satisfy the above-mentioned requirements, serious disturbance of public order is said to prevail and refugee protection should be granted.

Nonetheless, it is not possible or practical to argue that all cases of lack of freedom to adequate nourishment, satisfactory standard of living or ability to lead a life of normal life expectancy amount to poverty for the purpose of refugee protection.²²⁷ This would

²²⁰ Sen (n 198 above) 17.

²²¹ See Klinck (n 166 above) 666.

²²² See 1986 African Charter on Human and Peoples' Rights, preamble.

²²³ Centre for Economic and Social Rights (n 200 above) 11.

²²⁴ Centre for Economic and Social Rights (n 200 above) 7.

²²⁵ See Wood (n 9 above) 565.

²²⁶ Centre for Economic and Social Rights (n 200 above) 8.

²²⁷ Centre for Economic and Social Rights (n 200 above) 7-8.

open the doors of refuge too wide and cause an excessive burdening upon host States. Governments may well be the actors that violate socioeconomic rights relevant for the realisation of freedoms to sufficient nourishment, adequate living standards and ability to lead lives of normal life spans. Prevalent, common examples include, on the one hand, the interactional harm of corruption and, on the other hand, the omission of government to exercise its control or implement regulations in protecting its citizens against developmental schemes and projects by corporations.²²⁸ While there may be negative effects on the livelihoods of people, it is first important to identify an obligation to respect, protect or fulfil specific rights to food, housing, sanitation, water or medical services and establish if the government has violated such rights, through conduct or failure to act.²²⁹ There must also be violation of these obligations on a widespread scale.²³⁰

Many African countries struggle to build and foster socioeconomic circumstances conducive to the realisation of individual freedoms ‘to be adequately nourished, to enjoy adequate standards of living [and] to lead lives of normal life spans.’²³¹ Since socioeconomic rights are realised progressively, the gravity of deprivation will determine the level of urgency to seek refugee protection outside the State borders. Mere threats to survival in the face of such deprivation trigger urgency to resort to refugee protection, rather than awaiting an improvement in the country conditions as advocated for by Klinck.²³² As long as Sen’s above-mentioned freedoms are deprived and such capability deprivation poses a threat to the individual’s life, liberty or security according to the standard interpreted by scholars, refugee protection ought to be extended to those suffering such conditions.²³³ Such a reading accords with the flexible, humanitarian nature of the 1969 OAU Convention.

4.4 Distinguishing between economic migrants and refugees fleeing poverty

The different underlying causes of flight will demonstrate whether or not threats to the life, freedoms and security are so severe that they warrant flight. Economic migrants are perceived as those leaving their countries of origin willingly in order to seek a “better life” elsewhere. There is a resulting lack of pity, and more commonly enmity, towards economic migrants and they are thus deemed to be undeserving of protection.²³⁴ Refugees fleeing life-threatening circumstances of poverty have and will continue to fall in between the gaps of the 1951 Convention refugee definition and the economic migrant concept. It is imperative to draw the distinction in order to extend

²²⁸ Centre for Economic and Social Rights (n 200 above) 9.

²²⁹ Centre for Economic and Social Rights (n 200 above) 8.

²³⁰ Rankin (n 7 above) 426.

²³¹ Vizard (n 43 above) 3.

²³² Klinck (n 166 above) 673.

²³³ Klinck (n 166 above) 678.

²³⁴ Foster (n 45 above) 6.

refugee protection to people that are clearly in desperate need of it, particularly in Africa.

Although Foster's work explores the recognition of socioeconomic refugees in terms of the 1951 Convention refugee definition under the ground "membership of a particular social group", her work sheds some light on the distinction between forced or involuntary migrants and voluntary migrants. Forced or involuntary migrants are normally welcome to receive refugee protection due to the appreciation of "push" factors that force their movement. Meanwhile, voluntary migrants face hostility in receiving countries when seeking respective protection in terms of immigration law, as they are perceived to be attracted by "pull" factors.²³⁵ Thereby, in the case of voluntary migrants, there exists no compulsion to flee threats to survival, life, liberty or safety as required by the "expanded definition". Classifying refugees fleeing poverty as voluntary migrants would thus force them to return to the very life-threatening conditions from which they fled or force them to pursue journeys of hardship as they seek refugee protection in other countries. In most instances, they resort to illegal channels of migration where they live without legal documentation in host countries and in fear of deportation to their home countries where there is an existing danger to their lives, liberty or security.

Another approach has been to distinguish between migrants as voluntarily seeking economic opportunities and refugees as involuntarily fleeing political persecution. The binary distinction has been the sight of much debate.²³⁶ Rather than determining whether an asylum seeker is fleeing deprivation of freedoms pertaining to civil and political rights or socioeconomic rights, the Special Adjudicator in a UK decision held otherwise. The question to be solved is whether an asylum seeker is seeking refugee protection for 'personal convenience' or due to the fact that the country conditions are so dire that it is unreasonable to expect him or her to remain there. The focus should not be on the 'lack of opportunities and facilities' to be afforded to people in the respective country of origin. '[L]ack of opportunities and facilities'²³⁷ is normally linked to the reasons of flight of economic migrants even though such an inference leads to a restrictive approach to economic migrants' causes of flight. Again, this case was concerned with the classification of socioeconomic migrants as experiencing personal persecution on the ground "membership of a particular social group". Nonetheless, it provides an invaluable argument to this paper. Where people's freedoms are deprived, the determination of refugee status should be concerned with whether or not it would be unreasonable to expect them to remain and return to countries where such capability deprivation leading to poverty is intolerable and life-threatening.

Classification of refugees fleeing poverty as economic migrants causes such vulnerable forcibly displaced people to be viewed as 'fraudulent economic migrants' that seek to take advantage of the refugee system. Such an approach to refugees

²³⁵ See Foster (n 45 above) 7.

²³⁶ See Foster (n 45 above) 7-8.

²³⁷ See Foster (n 45 above) 241-242.

fleeing poverty disregards the extent of harm that they endure. They should, however, be appreciated and accepted as 'genuine humanitarian refugees'.²³⁸ The legitimate fear of threats posed on their survival, freedom and security necessitates refugee protection.

²³⁸ See Klinck (n 166 above) 664-665.

5. Chapter Four

Refugee numbers are rapidly increasing at alarming rates across the African continent. While the 1969 OAU Convention advocates for the humanitarian spirit of brotherhood and unity in the reception and protection of refugees, not all African States carry an equal burden in providing refugee protection.²³⁹ The geographic proximity of the African host countries that receive the most refugees results in this disproportionate reception of refugees in Africa. A mass influx of refugees poses further burdens on the already-destitute state of African host countries.²⁴⁰ An expansive interpretation of the “expanded definition” may pose additional strains on the refugee systems of host nations as it opens the doors of refuge to this newly classifying group of refugees, that is, those fleeing circumstances of poverty.

In addition to African host countries being some of the world’s poorest countries, environmental disasters and the predicament of foreign debt are amongst the various factors that aggravate the indigent living conditions of these host nations. The mass influx of refugees allegedly further burdens the socioeconomic state of these countries,²⁴¹ intensifies the instability of their economies and obstructs development projects.²⁴² These burdens result in the tendency of host nations being critical of an expansive interpretation of the “expanded definition” and its consequent acceptance of more and more refugees.

In most African countries, refugee protection and assistance is extended collectively by local governments and the UNHCR. Mass influx imposes financial and budgetary ramifications for both actors.²⁴³ Nonetheless, the UNHCR is the predominant actor in the extension of refugee protection and assistance on the continent. The establishment of a specific UNHCR fund for the creation and maintenance of long-lasting solutions is not adequate to accommodate the ever-increasing refugee numbers in the context of the constantly adapting refugee definition.²⁴⁴ Henceforth, where African host governments lack sufficient resources to provide refugee protection and assistance, they have no choice but to rely on the charity of donor states and organisations that provide financial and materialistic resources.²⁴⁵ In the face of the ever increasing refugee numbers, this does not stand to be a long durable solution that African host states can fully and solely rely on. Rather than close the doors to refugees fleeing poverty, adoption of an enduring, effective and efficient solution is necessary now more than ever.

²³⁹ Rwelamira (n 36 above) 158.

²⁴⁰ See D’Orsi (n 82 above) 104.

²⁴¹ VP Nanda ‘The African Refugee Dilemma: A Challenge for International Law and Policy’ (1985) 32 *Africa Today* 61 and 62.

²⁴² D’Orsi (n 82 above) 105.

²⁴³ Rwelamira (n 36 above) 159.

²⁴⁴ Nanda (n 241 above) 75.

²⁴⁵ JHS Milner *Refugees, the State and the Politics of Asylum in Africa* (2009) 53.

5.1 A Solution: Burden Sharing

The advancement of refugee law protection is the inherent advancement of human rights protection. Hence, the international community has the duty to protect and promote refugees' rights, specifically treating refugees with dignity. Thus, host states are obliged to share the responsibility of seeking long-lasting solutions for refugees who are without a community to seek safety and reside in.²⁴⁶ The 1951 Convention merely makes reference to this as shared liability in its preamble while the 1969 OAU Convention explicitly prioritises it within its provisions.²⁴⁷ The 1951 Convention acknowledges that the increased recognition of refugees has the likelihood of posing excessive burdens on host states, which can be alleviated through international cooperation.²⁴⁸ Meanwhile, the 1969 OAU Convention stipulates that the difficulties faced by host countries in extending refugee protection amidst the overwhelming increase of refugees must be shared with other OAU member states. The host country, under the auspices of the OAU, appeals to other member states for such assistance 'in the spirit of African solidarity'.²⁴⁹ Therefore, the solutions should inspire unity amongst African states and should not foster hostility and burden shifting amongst African states.

This provision of the 1969 OAU Convention has been coined as the principle of 'burden sharing'. The multiple, various costs that host countries incur in extending refugee protection should be equitably shared amongst a number of African states.²⁵⁰ This is intended to alleviate the burden of receiving a mass influx of refugees in any one host country. Receiving states, overwhelmed by the burden of hosting an exceedingly high number of refugees, without any assistance from other African member states and the international community, may be compelled to disregard the principle of non-*refoulement*.²⁵¹ As refugee movements have rapidly been increasing over the years, the connection between the principles of non-*refoulement* and burden-sharing is continuously under escalating tension in the face of the rise in refugee movements.²⁵² Appreciating that new categories of refugees are constantly arising in the face of new, changing refugee realities, the solution is not to close the doors of refugee protection but to better administrate the burden sharing system.

Burden sharing in Africa takes two forms, namely, financial and physical burden sharing. Financial burden-sharing constitutes monetary and material aid through bilateral or multilateral relations, 'such as the World bank and the UNHCR', or given

²⁴⁶ See D'Orsi (n 82 above) 102.

²⁴⁷ See D'Orsi (n 82 above) 103

²⁴⁸ 1951 Convention Preamble, para 4.

²⁴⁹ 1969 OAU Convention, article II(4).

²⁵⁰ Milner (n 245 above) 39.

²⁵¹ See 1969 OAU Convention, article II(3). The non-*refoulement* principle requires that OAU Member States do not reject, return or expel asylum seekers as that would force asylum seekers to return or remain in a place that threatens the life, security and freedom for reasons states in articles I(1) and I(2).

²⁵² Milner (n 245 above) 42.

by African states or the international community. Material aid could take the form of food assistance by the World Food Programme.²⁵³ On the other side of the burden sharing coin, physical burden sharing occurs either through 'permanent resettlement to a third country or through temporary relocation'.²⁵⁴ Challenges are encountered in the realisation of both financial and physical burden sharing.

Resettlement in neighbouring countries of first asylum, as a form of physical burden-sharing, rarely occurs in Africa.²⁵⁵ Although there have been increasing opportunities for resettlement in Africa, 'the UNHCR's capacity to identify refugees for resettlement...remains low'.²⁵⁶ Resettlement in a third, neighbouring country is a costly process. Refugees are also exposed to the social problems of integrating into the cultural context of the third country that they may be unfamiliar with. Therefore, resettlement to a third country has so commonly been viewed as the least attractive option for both the host countries and refugees.²⁵⁷

While advocating for burden sharing amongst OAU member states, it is important to ensure that the responsibilities are not transferred to these other Africa countries in such a way that burden is shifted, to a large extent or entirely, to other African states. A just apportion of accountabilities between states enhances collaborative efforts amongst states to equitably reallocate refugees.²⁵⁸ It would foster harmonious relations amongst OAU member states as each state discharges its responsibility to afford assistance to refugees within its capacities.

African host countries prefer financial means of burden sharing over physical burden sharing. Henceforth, they prepare and present thorough reports on the adverse effects of refugees on host communities prevailing at local, national and regional levels. As a result, donors and the international community continuously and increasingly provide financial assistance.²⁵⁹ By virtue of seeking aid from the global community, African governments rely on the financial aid of international donors rather than effectively implementing article II(4) of the 1969 OAU Convention by seeking aid from fellow OAU member states.²⁶⁰ This creates a relationship of over-dependence on the international community rather than promote development of the burden sharing principle.

While Sub-Saharan Africa witnesses the most refugee movements on the continent, no Sub-Saharan African OAU member state has legislated the principle of burden sharing. Nonetheless, Sub-Saharan African host countries are concerned with the

²⁵³ Milner (n 245 above) 46.

²⁵⁴ Milner (n 245 above) 49.

²⁵⁵ PH Koehn 'Refugee Settlement and Repatriation in Africa; Development Prospects and Constraints' in H Adelman and J Sorenson (ed) *African Refugees: Development Aid and Repatriation* (1994) 105.

²⁵⁶ Milner (n 245 above) 51.

²⁵⁷ T Kuhlman 'Organised Versus Spontaneous Settlement of Refugees in Africa' in H Adelman and J Sorenson (ed) *African Refugees: Development Aid and Repatriation* (1994) 117.

²⁵⁸ D'Orsi (n 82 above) 111.

²⁵⁹ Milner (n 245 above) 59.

²⁶⁰ D'Orsi (n 82 above) 106.

need to shield their indigent, unstable economies and poor communities from further heightened burden posed by increasing mass influx of refugees. Hence, they welcome and anticipate the development of the burden-sharing principle.²⁶¹ Providing domestic legal frameworks for burden sharing may mark a step of commitment, no matter how small, towards its respect and realisation amongst African host countries. In fact, 'there is an urgent need to construct and implement the legal and administrative mechanisms for burden sharing'.²⁶² It seems that the time to do so is now more than ever. The growing mismatch between an ever-increasing number of refugees and the levels of poverty in African host countries necessitates development of the principle of burden sharing.

5.2 Drawing inspiration from the Comprehensive Refugee Response Framework

With refugee numbers constantly growing, widespread across the world and becoming more and more complex,²⁶³ the Global Compact on Refugees (Global Compact), known also as the New York Declaration for Refugees and Migrants, was enacted to ensure 'predictable and equitable burden- and responsibility sharing' at various levels.²⁶⁴ Part II of the Global Compact, the Comprehensive Refugee Response Framework (CRRF), addresses a variety of issues, amongst which is the improvement of responses to the mass influx of refugees and migrants.²⁶⁵ It promotes the improved administration of large refugee movements in Africa, which consequently 'serves the interests of states [and] strengthens international order and stability', while still safeguarding and upholding refugee rights'.²⁶⁶

Refugee movements are largely felt at regional and sub-regional levels. Hence, regional and sub-regional mechanisms are significant comprehensive responses in their respective areas, taking cognisance of the specific regional or sub-regional political ambience of the root causes of refugee movements.²⁶⁷ The UNHCR regularly facilitates 'the exchange of good practice among relevant regional and sub-regional structures' through Global Refugee Forums. This platform encourages regional and sub-regional states to share different perceptions on resolving the refugee movements and promotes unity amongst regional and sub-regional states.²⁶⁸ These comprehensive responses do not seek to replace existing initiatives, but rather to reinforce and strengthen them.²⁶⁹ While it is not 'legally binding', the 14 of the UN member states that are 'currently...formally applying the CRRF'²⁷⁰ have expressed the

²⁶¹ D'Orsi (n 82 above) 105.

²⁶² D'Orsi (n 82 above) 107.

²⁶³ UNHCR 'The Global Compact on Refugees: Final Draft' paragraph 1 last accessed on 1 November 2018 at <http://www.unhcr.org/events/conferences/5b3295167/official-version-final-draft-global-compact-refugees.html>.

²⁶⁴ UNHCR (n 263 above) para 3.

²⁶⁵ Sharpe (n 32 above) 7-8.

²⁶⁶ D'Orsi (n 82 above) 109.

²⁶⁷ UNHCR (n 263 above) para 28.

²⁶⁸ UNHCR (n 263 above) para 30.

²⁶⁹ UNHCR (n 263 above) para 29.

²⁷⁰ UN doc. EC/69/SC/CRP.13 para 3.

political will and goal to fortify international ‘cooperation and solidarity’.²⁷¹ Therefore, the Global Compact complements the 1969 OAU Convention’s provision of burden sharing and any regional and sub-regional initiatives already in place. It reinforces unity amongst African states and encourages African states to work together in implementing burden sharing initiatives, rather than overly relying on international donors and the international community.

There are currently two regional comprehensive responses under the CRRF, namely, the MIRPS which is applicable in northern Central America and Mexico, and the Nairobi Declaration and Action Plan on Durable Solutions for Somali Refugees and Reintegration of Returnees in Somalia (Nairobi Declaration and Action Plan). Although there is no explicit provision of regional and sub-regional mechanisms in the CRRF, these two responses have made invaluable contributions to the improvement of the political will and response to the refugee movements in the respective regions.²⁷² The Intergovernmental Authority on Development (IGAD), a body of ministers from the different countries in the region, oversees the implementation, supervision and follow-up of the Nairobi Declaration and Action Plan.²⁷³ The objectives of the Nairobi Declaration are two-fold, that is, creation of conditions conducive for voluntary repatriation of Somali refugees through ‘State- and peace-building’, while facilitating effective burden sharing among host nations providing refuge to Somalis.²⁷⁴

Evidently, the fairly new and strategic CRRF is paving an invaluable and significant path for refugee burden sharing across the globe, having its roots in the 1951 Convention.²⁷⁵ In the context of this paper, on the one side of the coin, implementation of the principle of refugee burden sharing as per the 1969 OAU Convention and strengthened by the CRRF, would extend refugee protection to refugees. On the other side of the coin, it would initiate efforts of State-building in the refugees’ countries of origin and nationality in order to improve the conditions and ensure that refugees would be able to return to their home countries and lead lives free of poverty. An exemplary ‘State- and peace-building’²⁷⁶ initiative is the Somali National Forum on Durable Solutions for Refugees, Returnees and Internally Displaced Persons implemented in September 2017.²⁷⁷ It provides a platform that brings together various stakeholders including ‘regional governments, community leaders, and civil society’. Discussions evolve around the steps to be taken towards fostering ‘sustainable return and integration’ of Somali refugees, now incorporated in the National Action Plan of the Nairobi Declaration and Action Plan.²⁷⁸ The forum led to the drafting of a National

²⁷¹ UNHCR (n 263 above) para 4.

²⁷² UN doc. EC/69/SC/CRP.13 para 22.

²⁷³ UN doc. EC/69/SC/CRP.13 para 25.

²⁷⁴ UNHCR (n 48 above) 2.

²⁷⁵ UN doc. EC/69/SC/CRP.13 para 7.

²⁷⁶ UNHCR (n 48 above) 2.

²⁷⁷ UNHCR (n 48 above) 2.

²⁷⁸ UN doc. EC/69/SC/CRP.13 para 10.

Policy, intended to complement the Nairobi Declaration and Action Plan, which, at the beginning of 2018, was at its 'final stage of...development.'²⁷⁹

Other sub-regional and regional mechanisms ought also to be implemented in order to not only ease the burden of large scale influx of refugees on one specific host nation and strengthen solidarity amongst African nations, but to also address and tackle the root causes of large-scale movements of refugees, particularly poverty in this case.

²⁷⁹ UNHCR (n 48 above) 2.

6. Chapter Five

Recommendations and Conclusions

While the 1969 OAU Convention has received global praise for taking great strides in advancing refugee law,²⁸⁰ it still needs to be put into practice. If not, it stands to be a white elephant in international refugee law. The AU should begin to take steps in providing an interpretive framework for the “expanded definition”. This way, OAU member states would have a guideline to follow in determining cases of the “expanded definition”. The flexibility of the “expanded definition” would not be underplayed²⁸¹ and its innovativeness would be brought to life.²⁸² It would also be ascertained whether the first three grounds of the “expanded definition” are still as applicable as the ground “events seriously disturbing public order”, another much contested discussion.

The “expanded definition” should extend the overall humanitarian tone explicit throughout the preamble of the 1969 OAU Convention to the “expanded definition”.²⁸³ Thus, the ground “events seriously disturbing public order” should be interpreted in such a humanitarian manner. On this basis, refugee protection should be extended to those fleeing poverty on the ground of “events seriously disturbing public order”. A specific, restrictive determination of who would qualify for refugee status thereof is imperative in order to refrain from opening the gates of refugee protection too wide, thereby overburdening African host nations, that endure circumstances of widespread poverty themselves.

While refugee protection would be extended to those fleeing poverty, durable solutions must be enacted in order to alleviate the burden borne by already indigent host countries.²⁸⁴ CRRF has remarkably set out to reinforce refugee burden-sharing responsibilities amongst states.²⁸⁵ Under the auspices of the CRRF, the only sub-regional mechanism in Africa is the Nairobi Declaration and Action Plan, which has been in force for two years thus far. It has taken steps towards ensuring the equitable allocation of burden-sharing of Somali refugees while still improving country conditions in Somalia.²⁸⁶ These are two important complementary tasks as refugee protection should be a temporary measure and refugees should seek to eventually return to their countries of origin or nationality. It also plays the imperative role of development on the continent, which Africa takes into its own hands, consequently creating an independent Africa.

²⁸⁰ Rankin (n 7 above) 406.

²⁸¹ Rankin (n 7 above) 415.

²⁸² Rankin (n 7 above) 406.

²⁸³ Sharpe (n 32 above) 15.

²⁸⁴ See D’Orsi (n 82 above) 104.

²⁸⁵ UNHCR (n 263 above) paragraph 29.

²⁸⁶ UNHCR (n 48 above) 2.

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