

## EVALUATING THE CURRENT INTERNATIONAL LEGAL FRAMEWORK GOVERNING THE STATUS OF REFUGEES IN LIGHT OF CONTEMPORARY REFUGEE CRISES

### Making the Case for Granting Refugee Status to Persons Fleeing Generalised Violence

Drafted 66 years ago, the Convention Relating to the Status of Refugees (“Convention”) has been and remains the cornerstone of the international refugee law framework as it determines which individuals deserve refugee protection. Yet, in the past two decades, millions of asylum-seekers fleeing violence in various civil wars have arrived at the borders of states, seeking refugee protection, only to be turned away because they do not qualify as refugees. The fate of asylum-seekers fleeing from the conflicts in Afghanistan, Somalia, and Syria are salient instances of this unfortunate reality. Hence, it is pertinent to evaluate the relevance of the international refugee framework in light of modern-day refugee crises. Through examining the context in which the Convention was drafted, this article argues that the Convention continues to be hamstrung by obsolete considerations surrounding refugee crises, which in turn limit its present-day ability to cater to refugee outflows. It seeks to contribute to existing discourse on international refugee law by proposing an expanded definition of “refugees” to include those fleeing generalised violence as a remedy to the weaknesses of the Convention.

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We are facing the biggest refugee and displacement crisis of our time. Above all, this is not just a crisis of numbers; it is also a crisis of solidarity.<sup>[1]</sup>

1 The number of asylum-seekers in the world today, a number that has increased through the years, is 24 million.<sup>2</sup> Half of these asylum-seekers originate from Syria, Afghanistan and Somalia,<sup>3</sup> countries widely known to be plagued by civil strife or what is more commonly termed “generalised violence”.<sup>4</sup> More worryingly, these asylum-seekers are often rejected by receiving states as refugees on the basis that they do not qualify as refugees under the Convention Relating to the Status of Refugees<sup>5</sup> (“Convention”). However, as will be seen throughout the course of this article, the Convention is ill-equipped to deal with the types of refugee crises that occur today given its outdated conception of a refugee, which was formulated in the context of the Second World War (“WWII”) and the Cold War. In other words, there is a protection gap for those seeking asylum from generalised violence.

2 This article explores why such a gap exists, why it should be addressed, and how best to address it. Part I of this article analyses the background to the Convention and its subsequent Protocol Relating to the Status of Refugees (“Protocol”),<sup>6</sup> which expanded the Convention’s scope whilst retaining its definition of a refugee. It also explores the factors moulding the definition of a refugee in the Convention and the reasons for the definition remaining unchanged despite a widening of the Convention’s scope. Part II examines how the definition fails to account for the changing nature of international refugee crises, resulting in the lack of protection for those fleeing generalised violence since the 1990s. Part III considers three possible solutions that would extend refugee protection to those fleeing generalised violence, before concluding that an expansion of the Convention’s definition is perhaps the most desirable way to achieve protection for these individuals.

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1 Ban Ki-moon, “Remarks on Forced Displacement: A Global Challenge”, United Nations Secretary-General, statement delivered in Washington, DC (15 April 2016).

2 UNHCR, “Global Trends: Forced Displacement in 2015” (20 June 2016) at p 2.

3 UNHCR, “Global Trends: Forced Displacement in 2015” (20 June 2016) at pp 2–3.

4 The term “generalised violence” has been defined by UNHCR to refer to “the exercise of force not targeted at a specific object or individual”. Such situations are also referred to as “indiscriminate” violence: see UNHCR, “UNHCR Statement on Subsidiary Protection under the EC Qualification Directive for People Threatened by Indiscriminate Violence” (January 2008) at p 3. An example of generalised violence is the use of carpet-bombing and mortar-shelling during civil war. The increased frequency of instances of generalised violence is further described and discussed at various points in this article: see, eg, paras 9–10 and 66–67 below.

5 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

6 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

Part IV applies the proposed expanded definition to the ongoing Syrian and Boko Haram conflict and evaluates the practical considerations associated with such an expansion, and is also where the concluding remarks reside.

## I. Background to the Convention

### A. Eurocentricity of the Convention

3 To begin understanding why there are protection gaps in the Convention, one must first turn, briefly, to consider the historical origins of and motivations behind the treaty. After WWII, an estimated 30 million Europeans were forcibly displaced from their home countries.<sup>7</sup> Although some managed to return safely to their home countries, there were around 11 million Europeans who were still displaced.<sup>8</sup> Moreover, there was a continuous stream of asylum-seekers fleeing the communist regimes in Eastern Europe during that period as a result of the Cold War.<sup>9</sup> This was the context in which the Convention was developed – it was conceived as a response to the growing problem of displaced persons within Europe in the aftermath of earth-shaking global events.<sup>10</sup>

4 Accordingly, the definition of a refugee in the Convention, being one who has a “well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion,”<sup>11</sup> was particularly appropriate for the aforementioned

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7 Terje Einarsen, “Drafting History of the 1951 Convention and the 1967 Protocol” in *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Andreas Zimmermann, Jonas Dörschner & Felix Machts eds) (Oxford University Press, 2011) at p 45.

8 John Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (Cambridge University Press, 2000) at p 143; Terje Einarsen, “Drafting History of the 1951 Convention and the 1967 Protocol” in *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Andreas Zimmermann, Jonas Dörschner & Felix Machts eds) (Oxford University Press, 2011) at p 45.

9 Mel Gurtov, “Refugees in the Post-Cold War Era” (1991–1992) 28 *Willamette L Rev* 849 at 854; Erika Feller, “The Evolution of the International Refugee Protection Regime” (2001) 5 *JL & Pol’y* 129 at 131; Laura Barnett, “Global Governance and the Evolution of the International Refugee Regime” (2002) 14(2-3) *International Journal of Refugee Law* 238 at 244; see also Sadako Ogata, “Refugees: Challenges of the 1990s”, statement delivered at the New School for Social Research (11 November 1992).

10 Erika Feller, “The Evolution of the International Refugee Protection Regime” (2001) 5 *JL & Pol’y* 129 at 131.

11 Convention Relating to the Status of Refugees (28 July 1951) 189 UNTS 137 (entered into force 22 April 1954) Art 1A(2).

context. The displacement generated by WWII was primarily caused by the Holocaust, where Jews fled *en masse* because the Nazi government actively sought to exterminate them on the basis of their Jewish race and religion.<sup>12</sup> As for the Cold War, political dissidents were brutally repressed by communist regimes such as those in Russia, Poland and Yugoslavia.<sup>13</sup> The underlying similarity between the Jews and political dissidents was that their governments targeted them for characteristics fundamental to their identities, be it their race or political opinions.

5 In response, the office of the UN High Commissioner for Refugees (“UNHCR”) was established and the Convention was adopted to aid the repatriation and resettlement of displaced persons due to the aforementioned circumstances.<sup>14</sup> The Eurocentric considerations and experiences that formed the impetus of the Convention are reflected in the Convention’s original scope, which specifically mentioned its coverage over Europe and events occurring before 1951.<sup>15</sup> Notably, during the drafting of the Convention, states such as India, Mexico and Pakistan expressed concerns that the proposed definition did not adequately recognise displaced persons emerging from other situations, especially those common to their countries.<sup>16</sup> However, these concerns

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12 Mel Gurtov, “Refugees in the Post-Cold War Era” (1991–1992) 28 *Willamette L Rev* 849 at 854; Erika Feller, “The Evolution of the International Refugee Protection Regime” (2001) 5 *JL & Pol’y* 129 at 131; Laura Barnett, “Global Governance and the Evolution of the International Refugee Regime” (2002) 14(2-3) *International Journal of Refugee Law* 238 at 244.

13 *Cold War: The Essential Reference Guide* (James Arnold & Roberta Wiener eds) (ABC-CLIO, 2012) at p 24.

14 Tony Kushner & Katharine Knox, *Refugees in an Age of Genocide* (Routledge, 1999) at p 217; Laura Barnett, “Global Governance and the Evolution of the International Refugee Regime” (2002) 14(2-3) *International Journal of Refugee Law* 238 at 245; Theo Farrell & Olivier Schmitt, “The Causes, Character and Conduct of Armed Conflict, and the Effects on Civilian Populations, 1990–2010”, *Legal and Protection Policy Research Series* (April 2012) at p 12.

15 Convention Relating to the Status of Refugees (28 July 1951) 189 UNTS 137 (entered into force 22 April 1954) Art 1B(1).

16 United Nations, General Assembly, 4th Session, 256th Plenary Meeting, A/PV.256 (25 November 1949) at pp 144–145; United Nations, General Assembly, 4th Session, 260th Plenary Meeting, A/C.3/SR.260 (11 November 1949) at p 128; United Nations, General Assembly, 4th Session, 261st Plenary Meeting, A/C.3/SR.261 (12 November 1949) at p 130; see also Sarah Davies, “The Asian Rejection?: International Refugee Law in Asia” (2006) 52(4) *Australian Journal of Politics and History* 562 at 568.

were dismissed and overruled by European states.<sup>17</sup> As a result, many states, especially those in Asia, boycotted the Convention.<sup>18</sup>

**B. Factors that influenced the Convention to become an international instrument**

6 The situation improved through the adoption of the Protocol, which supplemented the Convention. By removing the temporal and geographical limitations of the Convention, the Protocol enabled the Convention to address refugee situations occurring beyond Europe. Precipitating this shift was the formation of newly independent African states in the 1950s–1960s.<sup>19</sup> Colonial empires were pulling out of Africa, leading to power struggles in the region as various factions fought for power and authority. This instability generated conflicts and violence, resulting in people fleeing their home countries and seeking refuge in other states.<sup>20</sup> However, UNHCR's mandate could not extend beyond Europe to these African states. Many of these African states were not party to the Convention in large part because of its exclusive focus on Europe,<sup>21</sup> and UNHCR's mandate was supported only by the Convention which obligated states parties to co-operate with UNHCR.<sup>22</sup> Further, the African states were in the process of formulating a regional framework to deal with the issue of asylum-seekers.<sup>23</sup> This new framework had the

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17 United Nations, General Assembly, 4th Session, 256th Plenary Meeting, A/PV.256 (25 November 1949) at pp 146–147; see also Sarah Davies, “The Asian Rejection?: International Refugee Law in Asia” (2006) 52(4) *Australian Journal of Politics and History* 562 at 568.

18 Sarah Davies, “The Asian Rejection?: International Refugee Law in Asia” (2006) 52(4) *Australian Journal of Politics and History* 562 at 569–570.

19 Terje Einarsen, “Drafting History of the 1951 Convention and the 1967 Protocol” in *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Andreas Zimmermann, Jonas Dörschner & Felix Machts eds) (Oxford University Press, 2011) at p 69.

20 Fonkem Achankeng, “Conflict and Conflict Resolution in Africa: Engaging the Colonial Factor”, *African Centre for the Constructive Resolution of Disputes* (12 July 2013) <<http://www.accord.org.za/ajcr-issues/%EF%BF%BCconflict-and-conflict-resolution-in-africa/>> (accessed 30 November 2017).

21 Terje Einarsen, “Drafting History of the 1951 Convention and the 1967 Protocol” in *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Andreas Zimmermann, Jonas Dörschner & Felix Machts eds) (Oxford University Press, 2011) at p 69.

22 Convention Relating to the Status of Refugees (28 July 1951) 189 UNTS 137 (entered into force 22 April 1954) Art 35.

23 Terje Einarsen, “Drafting History of the 1951 Convention and the 1967 Protocol” in *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Andreas Zimmermann, Jonas Dörschner & Felix Machts eds) (Oxford University Press, 2011) at p 70.

potential to render both the Convention and UNHCR ineffective and irrelevant, since it might adopt a different definition of refugees.<sup>24</sup>

7 Hence, UNHCR recommended the adoption of the Protocol<sup>25</sup> to incentivise newly independent African states to become parties to the international refugee framework.<sup>26</sup> Although mostly catalysed by the events in Africa, this move was also motivated by UNHCR's recognition of the need to engage with other continents, such as Asia, for which it was anticipated could experience refugee outflows in the future.<sup>27</sup> Adopting the Protocol would expand the scope of the Convention and reinforce its role as the cornerstone of the international refugee framework. However, the Protocol did not amend the definition of a refugee in any way, and the definition remains the same even today.

## **II. Failure of the Convention and its Protocol to cater to evolving international refugee crises**

### **A. Changing nature of international refugee crises**

8 The decision to broaden the refugee framework to address international outflows of asylum-seekers coincided with the growing recognition of universal human rights – each person is entitled to rights regardless of where they are from – and concomitant doubts about the limits of state sovereignty, which were often invoked as a shield against the expansion of human rights.<sup>28</sup> Extending the scope of refugee

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24 Terje Einarsen, "Drafting History of the 1951 Convention and the 1967 Protocol" in *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Andreas Zimmermann, Jonas Dörschner & Felix Machts eds) (Oxford University Press, 2011) at p 70.

25 United Nations High Commissioner for Refugees, *Proposed Measures to Extend the Personal Scope of the Convention Relating to the Status of Refugees of 28 July 1951* (UN Doc A/AC.96/346, 24 October 1996) at p 1.

26 Terje Einarsen, "Drafting History of the 1951 Convention and the 1967 Protocol" in *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Andreas Zimmermann, Jonas Dörschner & Felix Machts eds) (Oxford University Press, 2011) at p 69.

27 United Nations High Commissioner for Refugees, *Proposed Measures to Extend the Personal Scope of the Convention Relating to the Status of Refugees of 28 July 1951* (UN Doc A/AC.96/346, 24 October 1996) at p 1; Terje Einarsen, "Drafting History of the 1951 Convention and the 1967 Protocol" in *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Andreas Zimmermann, Jonas Dörschner & Felix Machts eds) (Oxford University Press, 2011) at p 70.

28 United Nations High Commissioner for Refugees, *Note on International Protection* (UN Doc A/AC.96/830, 7 September 1994) at paras 11 and 25; see also James C Hathaway, "A Reconsideration of the Underlying Premise of Refugee Law" (1990) 31 Harv Int'l LJ 129 at 140–141.

protection was consistent with the growing legitimacy of human rights as international refugee law is essentially about safeguarding vulnerable persons who do not have a state they can reside in safely. Despite these good intentions, the mistake was in expanding the Convention's scope without contemplating the types of crises which were likely to arise given the varying socio-political contexts of other regions.<sup>29</sup> In effect, the Protocol applied a Eurocentric approach to a Eurocentric problem to the world and continued to ignore what could have been appreciated as early as when the Convention was first drafted.<sup>30</sup>

9 Specifically, the focus on persecution based on the five Convention grounds, though eminently sensible within the European context in the 1950s, was and continues to be inadequate in dealing with the geopolitical situations of other regions and with contemporary refugee crises given the changing nature of conflicts. Such a focus was initially effective in dealing with refugee crises arising from WWII and the Cold War in Europe. For example, Czech refugees who fled Soviet repression of the nationalist uprising in 1968<sup>31</sup> received refugee protection since the Convention was envisioned to encompass those fleeing from the Soviet Union due to political persecution. However, in other regions, conflicts that generated refugee outflows were not of the same nature as the WWII or the Cold War, since civilians were not being repressed by the State because of their inherent beliefs or characteristics.<sup>32</sup> Instead, they were fleeing as they were trapped in the crossfires of wars fought between competing factions. Within Africa, states such as the Democratic Republic of the Congo ("DRC")<sup>33</sup> and

29 Terje Einarsen, "Drafting History of the 1951 Convention and the 1967 Protocol" in *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Andreas Zimmermann, Jonas Dörschner & Felix Machts eds) (Oxford University Press, 2011) at p 69.

30 Terje Einarsen, "Drafting History of the 1951 Convention and the 1967 Protocol" in *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Andreas Zimmermann, Jonas Dörschner & Felix Machts eds) (Oxford University Press, 2011) at p 67.

31 Laura Barnett, "Global Governance and the Evolution of the International Refugee Regime" (2002) 14(2-3) *International Journal of Refugee Law* 238 at 247.

32 Mel Gurtov, "Refugees in the Post-Cold War Era" (1991-1992) 28 *Willamette L Rev* 849 at 854; Erika Feller, "The Evolution of the International Refugee Protection Regime" (2001) 5 *JL & Pol'y* 129 at 132, 136 and 138; Laura Barnett, "Global Governance and the Evolution of the International Refugee Regime" (2002) 14(2-3) *International Journal of Refugee Law* 238 at 258; Sarah Davies, "The Asian Rejection?: International Refugee Law in Asia" (2006) 52(4) *Australian Journal of Politics and History* 562 at 575.

33 United Nations Economic Commission for Africa, "Conflicts in the Democratic Republic of Congo: Causes, Impacts and Implications for the Great Lakes Region" (September 2015) at p 9; see also "Democratic Republic of Congo Profile - Timeline", *BBC News Africa* (13 July 2017).

Zimbabwe<sup>34</sup> experienced tumultuous and fractious transitions from colonialism to newly independent states,<sup>35</sup> leading civilians to flee the country. In the DRC, the post-independence conflict, precipitated after Belgium started ceding control of the country, was sparked off by disagreements between political elites on how to organise the State, which resulted in rebellions and secessionist wars.<sup>36</sup> This instability was exacerbated by interventions by Western powers which fought proxy wars to stem the expansion of communism in Africa.<sup>37</sup> The loss of political, economic, and social stability caused significant displacements of civilians, inducing an outflow of asylum-seekers.<sup>38</sup> These post-colonial conflicts were similarly experienced by Asian states.<sup>39</sup>

10 Furthermore, there was a steep rise in armed conflicts where masses of people fled for their lives.<sup>40</sup> Examples include: Afghans displaced by the Afghan Civil War in 1989; Cambodian, Vietnamese and Laotians fleeing from the Cambodia–Vietnam War; and Liberians seeking refuge in other states due to the civil strife in Liberia in 1990.<sup>41</sup> These people were not being targeted for any of the Convention grounds, but were simply fleeing from conflict and violence. Since they did not fall within the ambit of the Convention, they were denied refugee status. Other examples of individuals fleeing armed conflict but were denied asylum because they did not qualify as refugees under the Convention include: thousands of Guatemalans, El Salvadorans and Nicaraguans who had fled to the US and Canada; and Tamils from

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34 “Zimbabwe Profile – Timeline”, *BBC News Africa* (26 November 2017).

35 United Nations High Commissioner for Refugees, *Persons Covered by the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and by the Cartagena Declaration on Refugees (Submitted by the African Group and the Latin American Group)* (UN Doc EC/1992/SCP/CRP.6, 6 April 1992) at para 4.

36 United Nations Economic Commission for Africa, “Conflicts in the Democratic Republic of Congo: Causes, Impacts and Implications for the Great Lakes Region” (September 2015) at p 11.

37 United Nations Economic Commission for Africa, “Conflicts in the Democratic Republic of Congo: Causes, Impacts and Implications for the Great Lakes Region” (September 2015) at p 9.

38 Marie-Laurence Flahaux & Bruno Schoumaker, “DRC: A Migration History Marked by Crises and Restrictions”, *Migration Policy Institute* (20 April 2016).

39 Liu Yangyue, *Competitive Political Regime and Internet Control* (Cambridge Scholars Publishing, 2014) at p 137; “Dien Bien Phu & the Fall of French Indochina, 1954”, *Office of the Historian* <<https://history.state.gov/milestones/1953-1960/dien-bien-phu>> (accessed 30 November 2017).

40 United Nations High Commissioner for Refugees, *The State of the World’s Refugees 1997–98: A Humanitarian Agenda* (Oxford University Press, 1997); see also Aristide R Zolberg, Astri Suhrke & Sergio Aguayo, *Escape from Violence: Conflict and the Refugee Crisis in the Developing World* (Oxford University Press, 1989).

41 United Nations High Commissioner for Refugees, *Report of the United Nations High Commissioner for Refugees, 1990, A/45/12* (24 September 1990).



Sri Lanka, Palestinians, Christians and others from Lebanon, or Kurds from eastern Turkey who had fled to Europe.<sup>42</sup>

11 By 1992, it was clear that these new groups of asylum-seekers required urgent international attention, as the total number of displaced persons had increased sevenfold from the 1970s and exceeded 18 million.<sup>43</sup> Yet, there was no revision of the Protocol nor any serious call to do so. Instead, states chose to adopt stopgap measures by developing alternative frameworks to international refugee protection.<sup>44</sup> This highlighted one of the greatest shortcomings of the Convention and its subsequent Protocol: an approach developed for one specific socio-political context cannot be easily or sustainably expanded to the global context. The causes and contexts of persecution had changed significantly, with a greater number of asylum-seekers fleeing from generalised violence resulting from protracted civil war, communal violence, or civil disorder.<sup>45</sup>

12 An example of a stopgap measure by states is the aforementioned regional refugee framework that the African states were contemplating, which subsequently manifested as the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (“OAU Convention”).<sup>46</sup> It expanded the Convention’s refugee definition to include persons who are compelled to leave their country “owing to external aggression, occupation, foreign domination, or events seriously disturbing public order”.<sup>47</sup> The objective was to cater to the specific socio-political circumstances of refugee crises in Africa.<sup>48</sup>

42 Walter Kälin, “Refugees and Civil Wars: Only a Matter of Interpretation?” (1991) 3 *International Journal for Refugee Law* 435 at 436.

43 Sadako Ogata, “Refugees: Challenges of the 1990s”, statement delivered at the New School for Social Research (11 November 1992).

44 See paras 14–17 below for a discussion on the flaws and inadequacies of these alternative frameworks.

45 Jerzy Sztucki, “Who is a Refugee? The Convention Definition: Universal or Obsolete?” in *Refugee Rights and Realities* (Frances Nicholson & Patrick Twomey eds) (Cambridge University Press, 1999) at p 60; Laura Barnett, “Global Governance and the Evolution of the International Refugee Regime” (2002) 14(2-3) *International Journal of Refugee Law* 238 at 250.

46 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (10 September 1969) UNTS 14691 (entered into force 20 January 1974).

47 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (10 September 1969) UNTS 14691 (entered into force 20 January 1974) Art I(2).

48 Medard Rwelamira, “Some Reflections on the OAU Convention on Refugees: Some Pending Issues” (1983) 16(2) *Comparative and International Law Journal of Southern Africa* 155 at 167; Rainer Hoffman, “Refugee Law in Africa” (1989) 39 *Law and State* 79 at 83; United Nations High Commissioner for Refugees, *Persons Covered by the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and by the Cartagena Declaration on Refugees (Submitted by the African Group and the Latin American Group)* (UN Doc EC/1992/SCP/CRP.6, (cont’d on the next page)

A few other regional declarations also followed suit in broadening the refugee definition to include those seeking asylum from generalised violence,<sup>49</sup> with the similar justification of catering to the refugee crises emerging in the respective regions.<sup>50</sup> This broader protection for such persons has even been adopted within the European context.<sup>51</sup>

13 The need to adopt stopgap measures reflected the Convention's acute inability to adequately address contemporary refugee crises and those beyond Europe as it was initially only envisioned to cover a narrow set of events and circumstances.<sup>52</sup> Associated failures include the lack of any provisions regarding sharing the burden of housing refugees.<sup>53</sup> Although this was not problematic in the immediate period following WWII and the Cold War as there was for the most part only a limited group of refugees, it is today because of the sheer number of refugees generated from modern-day conflicts, and the difficult experiences they have to endure when they are unable to find a permanent home.<sup>54</sup>

**B. Continued failure to cater to international refugee crises today**

14 The type of refugee crises that have emerged since the 1990s is still prevalent today with huge refugee outflows generated by Syria,

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6 April 1992) at para 1; Marina Sharpe, "The 1969 African Refugee Convention: Innovations, Misconceptions and Omissions" (2012) 58(1) McGill LJ 95 at 101.

49 Asian-African Legal Consultative Organization, "Bangkok Principles on Status and Treatment of Refugees" (31 December 1966) Art 1(2); Organization of American States, "Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama" (19-22 November 1984) Conclusion III(3).

50 Michael Reed-Hurtado, "The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America", *Legal and Protection Policy Research Series* (June 2013) at pp 6-9.

51 "Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted" [2004] *Official Journal of the European Union* 12, Art 15(c).

52 Tony Kushner & Katharine Knox, *Refugees in an Age of Genocide* (Routledge, 1999) at pp 10-12; Laura Barnett, "Global Governance and the Evolution of the International Refugee Regime" (2002) 14(2-3) *International Journal of Refugee Law* 238 at 246.

53 UNHCR, "A 'Timeless' Treaty under Attack" *UNHCR News and Stories* (1 June 2001).

54 Erika Feller, "Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come" (2006) 18(3-4) *International Journal of Refugee Law* 509 at 525.

Somalia and Afghanistan due to generalised violence.<sup>55</sup> Examining the treatment of such asylum-seekers would demonstrate how prevalent this protection gap in the Convention remains today. One important observation at this juncture is that African and European states are most open to offering protection to asylum-seekers fleeing generalised violence. There are of course exceptions, such as Lebanon, which accept some of the largest refugee outflows.<sup>56</sup> However, this is partially attributable to the fact that they are adjacent to countries such as Syria and Iraq that generate large refugee outflows. Notably, even the protection offered by African and European states is unlikely to be pursuant to their obligations under the Convention. Rather, the protection offered is pursuant to their obligations under regional conventions which have extended protection to those fleeing from generalised violence. Unfortunately, these alternative frameworks to the Convention do not effectively address the refugee outflows. Even amongst African and European states, protection is not consistently afforded to persons fleeing from generalised violence.

15 In Africa, the OAU Convention, as aforementioned, provides that a person is entitled to refugee status if he, “owing to external aggression, occupation, foreign domination, or events seriously disturbing public order”, is compelled to leave his country.<sup>57</sup> Hence, individuals fleeing generalised violence are recognised as refugees in the African continent, and states such as Kenya<sup>58</sup> and Ethiopia<sup>59</sup> have afforded refugee protection to Somali asylum-seekers fleeing from generalised violence. However, even though the African support has been encouraging, this is not uniform across all African states and at all points in time. Perhaps most notably, in 2015, Kenya forcibly closed down the Dadaab refugee complex housing Somali asylum-seekers.<sup>60</sup> This inconsistent treatment towards refugees by African states is due to the huge economic burdens that the majority of such states hosting refugees are faced with, hampering their abilities to accept more refugees.<sup>61</sup> Although the principle of burden-sharing is enshrined in the

55 UNHCR, “World at War: UNHCR Global Trends – Forced Displacement in 2014” (18 June 2015) at p 3; UNHCR, “Global Trends: Forced Displacement in 2015” (20 June 2016) at p 16.

56 UNHCR, “Global Trends: Forced Displacement in 2015” (20 June 2016) at p 3.

57 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (10 September 1969) UNTS 14691 (entered into force 20 January 1974) Art I(2).

58 Mark Yarnell, “A Long Way to Go for Somali Refugee Returns”, *Refugees International* (5 November 2015).

59 Brendan McBryde, “10 Countries That Accept the Most Refugees”, *Borgen Magazine* (22 January 2016).

60 Hanibal Goitom, “Kenya: Proposal to Forcibly Repatriate Somali Refugees”, *The Law Library of Congress* (16 April 2015).

61 United Nations High Commissioner for Refugees, *Persons Covered by the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and by the* (cont'd on the next page)

OUA Convention,<sup>62</sup> most African states have grave socio-economic difficulties, making the redistribution of refugees a tall order.<sup>63</sup>

16 In Europe, the 2004 Council Directive (“Directive”) provides subsidiary protection for persons fleeing generalised violence, by affording them refugee-like status.<sup>64</sup> In line with this, some European states such as Germany, Greece and Sweden<sup>65</sup> have accorded refugee-like protection to Syrian asylum-seekers. However, this practice is also unfortunately inconsistent.<sup>66</sup> For instance, in 2016, Germany forcibly returned Somali asylum-seekers.<sup>67</sup> One reason for this inconsistent treatment is because the threshold of “serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict” required in the Directive is very high.<sup>68</sup> Moreover, states which usually take in refugees, such as

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*Cartagena Declaration on Refugees (Submitted by the African Group and the Latin American Group)* (UN Doc EC/1992/SCP/CRP.6, 6 April 1992) at para 17; George Okoth-Obbo, “Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa” (2001) 20(1) *Refugee Survey Quarterly* 1 at 92; JO Moses Okello, “The 1969 OAU Convention and the Continuing Challenge for the African Union” (2014) *FMR* 70 at 72.

62 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (10 September 1969) UNTS 14691 (entered into force 20 January 1974) Art II(4).

63 “The 1969 OAU Convention and the Continuing Challenge for the African Union” (2014) *FMR* 70 at 72; Marina Sharpe, “The 1969 African Refugee Convention: Innovations, Misconceptions and Omissions” (2012) 58(1) *McGill LJ* 95 at 107; see also Jean-Francois Durieux & Agnès Hurwitz, “How Many Is Too Many? African and European Legal Responses to Mass Influxes of Refugees” (2004) 47 *German Yearbook of International Law* 105 at 128–129.

64 “Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted” [2004] *Official Journal of the European Union* L12, Art 15(c).

65 Dieter Holger, “29 Countries Accepting Refugees from Syria and the Mideast”, *Inquisitr* (6 September 2015); Batsheva Sobelman, “Which Countries Are Taking in Syrian Refugees?”, *Los Angeles Times* (8 September 2016).

66 Volker Türk, “Protection Gaps in Europe? Persons Fleeing the Indiscriminate Effects of Generalised Violence”, speech delivered at UNHCR’s Commemorations Year in Europe Launch Forum (18 January 2011) at pp 7–8; UNHCR, “Safe at Last?: Law and Practice in Selected EU Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence” (July 2011) at p 100.

67 Adirahman Abdi, “Somalia: Somali Refugees in Germany Protest against Rejection of Asylum Applications”, *Horseed Media* (9 January 2016); Erin Cunningham, “Europe Wants to Deport Afghan Migrants, But Kabul Is Reluctant to Accept Them”, *The Washington Post* (19 March 2016).

68 *NA v UK* App no 25904/07 (ECtHR, 17 July 2008) at [115]; Volker Türk, “Protection Gaps in Europe? Persons Fleeing the Indiscriminate Effects of Generalised Violence”, speech delivered at UNHCR’s Commemorations Year in Europe Launch Forum (18 January 2011) at p 7.

Poland, are experiencing budgetary strains from the large refugee intakes and have refused to continue accepting them.<sup>69</sup>

17 Looking beyond Africa and Europe, the situation for persons fleeing generalised violence is even more pessimistic. The protection afforded to them is either *ad hoc* or non-existent,<sup>70</sup> since such regions do not have similar provisions to the OAU Convention or the Directive. The closest is the Bangkok Principles Concerning the Treatment of Refugees<sup>71</sup> (“Bangkok Principles”) and the Cartagena Declaration on Refugees<sup>72</sup> (“Cartagena Declaration”). The Bangkok Principles adopt the exact wording in the OAU Convention, while the Cartagena Declaration similarly states that a person fleeing his home country “because [his life], safety, or freedom [has] been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order” will be granted refugee status.<sup>73</sup> However, both are non-binding instruments. All things considered, it is important to understand, at its core, why individuals fleeing generalised violence are falling through the cracks of the refugee definition in the Convention and whether they are deserving of refugee protection.

### C. *Difficulties in applying the Convention’s refugee definition to those fleeing generalised violence*

18 A refugee, as defined in the Convention, is a person who is (a) outside his country of origin and (b) unable or unwilling to return there or to avail himself of its protection (c) on account of a well-founded fear of persecution for reasons of race, religion,

69 Matt Broomfield, “Poland Refuses to Take a Single Refugee Because of ‘Security Fears’”, *Independent Europe* (9 May 2016).

70 United Nations High Commissioner for Refugees, *Persons Covered by the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and by the Cartagena Declaration on Refugees (Submitted by the African Group and the Latin American Group)* (UN Doc EC/1992/SCP/CRP.6, 6 April 1992) at para 11; Ashley Fantz, Becky Anderson & Schams Elwazer, “Refugee Crisis: Why Aren’t Gulf States Taking Them in?”, *CNN* (8 September 2015); Zulfiqar Ali, “Afghan Refugees in Pakistan Forced to Leave the Country in Response to Get-Tough Measures”, *Los Angeles Times* (31 August 2016).

71 Asian-African Legal Consultative Organization, “Bangkok Principles on Status and Treatment of Refugees” (31 December 1966).

72 Organization of American States, “Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama” (19–22 November 1984).

73 Asian-African Legal Consultative Organization, “Bangkok Principles on Status and Treatment of Refugees” (31 December 1966) Art 1(2); Organization of American States, “Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama” (19–22 November 1984) Conclusion III(3).

nationality, membership of a particular social group, or political opinion.<sup>74</sup> The first two elements are usually undisputed for persons fleeing generalised violence; they would have fled their home countries and the violence is typically either perpetrated by the State or caused by the State's loss of control. However, it is particularly difficult for them to satisfy the third element.

19 This is because violence may sometimes be indiscriminate and incidentally inflicted on civilians in the midst of infighting.<sup>75</sup> Examples of such types of violence, as recognised by UNHCR, include mortar or aerial assaults of urban areas.<sup>76</sup> Civilians that are fleeing from such violence are not singled out or persecuted on any of the grounds,<sup>77</sup> disqualifying them of any protection under the Convention. But even if violence is discriminate, it is hard to prove persecution for reasons of the five grounds in the Convention due to the practicalities of conflicts. To prove persecution, one must “show good reason why he individually fears persecution”.<sup>78</sup> This requires proof of purposeful discrimination against the persecuted persons, which is harder to establish for violence during civil wars.<sup>79</sup> While it is true that violence often has a deeper underlying motivation,<sup>80</sup> it is difficult to assess the motives of the aggressor.<sup>81</sup> This problem is compounded as most states, when assessing if an individual is persecuted, take a restrictive approach<sup>82</sup> – actions by

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74 Convention Relating to the Status of Refugees (28 July 1951) 189 UNTS 137 (entered into force 22 April 1954) Art 1A(2).

75 Vanessa Holzer, “Legal and Protection Policy Research Series: The 1951 Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence”, *Legal and Protection Policy Research Series* (September 2012) at p 22.

76 Volker Türk, “Protection Gaps in Europe? Persons Fleeing the Indiscriminate Effects of Generalised Violence”, speech delivered at UNHCR's Commemorations Year in Europe Launch Forum (18 January 2011) at p 8.

77 Walter Kälin, “Refugees and Civil Wars: Only a Matter of Interpretation?” (1991) 3 *International Journal for Refugee Law* 435 at 437–438.

78 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (United Nations High Commissioner for Refugees, 2011) at para 45.

79 Guy S Goodwin-Gill, *The Refugee in International Law* (Clarendon Press, 1983) at pp 44–45; Walter Kälin, “Refugees and Civil Wars: Only a Matter of Interpretation?” (1991) 3 *International Journal for Refugee Law* 435 at 438.

80 Volker Türk, “Protection Gaps in Europe? Persons Fleeing the Indiscriminate Effects of Generalised Violence”, speech delivered at UNHCR's Commemorations Year in Europe Launch Forum (18 January 2011) at p 5.

81 Walter Kälin, “Refugees and Civil Wars: Only a Matter of Interpretation?” (1991) 3 *International Journal for Refugee Law* 435 at 437.

82 Terje Einarsen, “Drafting History of the 1951 Convention and the 1967 Protocol” in *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Andreas Zimmermann, Jonas Dörschner & Felix Machts eds) (Oxford University Press, 2011) at p 68; Walter Kälin, “Refugees and Civil Wars: Only a Matter of Interpretation?” (1991) 3 *International Journal for Refugee Law* 435 at 436.

the aggressor against members of a certain group are usually not persecutory if a state can justify its actions based on its legitimate right to uphold law and order, and to safeguard its territory.<sup>83</sup>

20 Hence, the choice to attack a rebel stronghold using indiscriminate methods of warfare could be reasoned by the State as having a legitimate objective of securing a strategic military base against rebel forces. Such civilians would appear to not be targeted, but were merely unfortunate to be caught in the crossfire. For instance, the Syrian government can assert that the main objective of conducting airstrikes against Aleppo is to weaken the rebel stronghold, and that the political opinion of the civilians in Aleppo are not relevant considerations. In such cases, it is an uphill battle for civilians to prove that they qualify under the Convention grounds. Yet another reason why the third element is difficult to satisfy is the five grounds are under-inclusive. Discriminate attacks may be for reasons beyond the Convention, such as economic reasons<sup>84</sup> as in the case of the diamond mines in the DRC.<sup>85</sup> Therefore, the crucial weaknesses of the Convention are its overt focus on persecution, which is particularly difficult to prove during conflicts, and the five grounds as necessary elements of refugee status determination.

#### **D. Why people fleeing generalised violence deserve refugee protection**

From the perspective of the individual refugee, whether she be bombed by her own government because of her union activity or because of a state policy to bomb randomly villages in order to flush out rebel forces, her need to flee to safety is largely the same as the victim of war.<sup>[86]</sup>

21 Given that those fleeing generalised violence are not protected by the Convention due to its overt focus on persecution and the five grounds as necessary elements, the question is whether these are justified boundaries to delineate who deserves refugee protection. Although the Convention's focus on persecution ensures that refugee status is not granted frivolously, it does not protect people who face equally, if not even more, devastating treatments and conditions as those

83 Walter Kälin, "Refugees and Civil Wars: Only a Matter of Interpretation?" (1991) 3 *International Journal for Refugee Law* 435 at 439.

84 UNHCR, "Summary Conclusions on International Protection of Persons Fleeing Armed Conflict and Other Situations of Violence" (20 December 2012) at para 4.

85 "Oil, Gas and Mining Industries", *Amnesty International* <<http://www.amnestyusa.org/our-work/issues/business-and-human-rights/oil-gas-and-mining-industries/conflict-diamonds>> (accessed 6 December 2017).

86 Isabelle Gunning, "Expanding the International Definition of Refugee" (1989) 13(1) *Fordham Int'l LJ* 35 at 54.

subject to targeted persecution. Regrettably, mass rape and killings of civilians are still relatively common despite the attempt to establish international humanitarian law (“IHL”) across the world. Many examples come to mind: the indiscriminate use of Agent Orange in the Vietnam War; the carpet-bombing of Kabul in Afghanistan’s 1996 civil war; the bombing of Serbia by NATO airstrikes in 1999; and the relentless shelling of Aleppo by multiple sides in the ongoing Syrian civil war. In these cases, civilians were clearly not being targeted because of their “race, religion, nationality, membership of a particular social group or political opinion”. They were being targeted either because their presence hindered military operations against enemy combatants, or because of a supposition, usually unfounded, that they were harbouring and helping enemy forces.<sup>87</sup> Arguably, the harms inflicted on civilians there, albeit indiscriminate, are more devastating than certain cases of targeted persecution during peacetime. It would be contradictory if we excluded generalised violence on the sole basis that there was no specific reason why civilians were being targeted.

22 A potential rejoinder to the above is that persecution amplifies these harms and makes them particularly acute, since one’s own religious or ethnic group is being specifically targeted; moreover, the practical effect of this specificity is that resources, be it government forces or local militias, will be focused on these groups, making brutalities more likely.<sup>88</sup> While it may be true that occasionally, the harms from persecution are worse than the harms from generalised violence, this is untrue in most cases. For example, political asylum-seekers from Russia fleeing arbitrary detention may face torture and solitary confinement if they are refused refuge, but the Afghans who were caught in the violent clashes between the Taliban and the Northern Alliance in 1996 would have almost certainly faced torture, rape or death if they had not fled. Therefore, the key common element between persecution and generalised violence is that the harm is fundamentally unavoidable save for seeking asylum in another country. This establishes why including generalised violence will better align the definition to our moral intuitions on refugee-status determination.

23 Further, generalised violence often only occurs when the State lacks the capacity or shirks from its duty to protect its own citizens. In such circumstances, civilians are left vulnerable to mass atrocities from other contenders in the conflict. This then fulfils at least one of the requirements in the Convention’s definition for a refugee: the inability to

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87 Richard Spencer, “Assad Regime Accused of String of Syria Massacres in UN Report”, *The Telegraph* (11 September 2013).

88 *Understanding Genocide: The Social Psychology of the Holocaust* (Leonard Newman & Ralph Erber eds) (Oxford University Press, 2002) at p 331.



avail oneself of state protection. For instance, the Somali government was completely overrun after the United Somali Congress overthrew President Siad Barre's regime in 1991. This resulted in the collapse of government forces, rendering them utterly ineffectual as warring clans competed for control of the capital; in turn, this enabled these clans to commit atrocities against civilians both within and outside of Mogadishu, especially against those who had earlier been in the territory of other clans.<sup>89</sup> Notably, civilians fleeing Mogadishu do not qualify under persecution on the grounds of ethnicity since almost all clans belonged to the broader Hawiye ethnic group.

24 A further reason supporting the recognition of such individuals as refugees is the presence of substantial agreement that they deserve refugee protection. While this agreement is not enough to form international custom as it is not widespread and consistent,<sup>90</sup> it is indicative of the widely perceived gap in the Convention. For instance, numerous states have adopted regional instruments and declarations, which extend refugee status to people fleeing generalised violence.<sup>91</sup> Further, non-state actors have similarly recognised this gap in the Convention. UNHCR has expanded its mandate away from merely assisting refugees protected under the Convention to helping those suffering from generalised violence.<sup>92</sup> However, the official expansion of the definition of refugees by a UN body is unsustainable because states can, at their whims and fancies, reject asylum-seekers fleeing generalised violence since they are not recognised as legitimate refugees under the Convention, to which states are bound by. It is crucial for a majority of the states, particularly specially affected states, to agree to expand the definition of refugees for such rights to be accorded to those fleeing generalised violence.

25 Being recognised as a refugee at international law is vital as it entitles an asylum-seeker to a host of internationally binding rights, including civil and socio-economic rights.<sup>93</sup> A refugee has the same

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89 Lidwien Kapteijns, "Clan Cleansing in Somalia: The Ruinous Turn of 1991" in *Patterns of Violence in Somalia* (World Peace Foundation, 2013) at p 7.

90 *North Sea Continental Shelf*, Judgment, ICJ Reports 1969, p 3 at [74].

91 See, eg, paras 15–17 above.

92 United Nations High Commissioner for Refugees, *Note on International Protection* (UN Doc A/AC.96/830, 7 September 1994) at paras 30–32; UNHCR, "Note on the Mandate of the High Commissioner for Refugees and His Office" (1 October 2013) at p 3; see also Erika Feller, "The Evolution of the International Refugee Protection Regime" (2001) 5 JL & Pol'y 129 at 132 and Laura Barnett, "Global Governance and the Evolution of the International Refugee Regime" (2002) 14(2–3) *International Journal of Refugee Law* 238 at 248 and 250.

93 Convention Relating to the Status of Refugees (28 July 1951) 189 UNTS 137 (entered into force 22 April 1954) Arts 2–34; see also James C Hathaway & (cont'd on the next page)

rights as any other foreigner who is a legal resident of the State.<sup>94</sup> While there are other protection frameworks such as international human rights (“IHR”) and IHL which may cover asylum-seekers fleeing from generalised violence, neither affords as wide a range of rights as refugee protection. Under IHR frameworks, rights are granted to individuals typically in relation to their own state.<sup>95</sup> Although there is the obligation not to return an individual to danger (mirroring the *non-refoulement* provision in the Convention)<sup>96</sup> in instruments such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>97</sup> the rights granted to such individuals are nowhere as extensive as those granted to refugees under the Convention.<sup>98</sup> Additionally, IHL deals exclusively with armed conflicts, and even within that realm, it merely places constraints on how states can fight armed conflicts rather than provide civilians with rights.<sup>99</sup> Humanitarian aid as an alternative is also not as ideal as refugee protection. There is no obligation for any state to shelter the individual. Any assistance given in the form of humanitarian aid merely provides assistance to that individual in his home country. In any case, humanitarian aid depends on the goodwill of states and the capacity of non-governmental organisations. Since there are normative arguments for recognising that this group of individuals have legitimate refugee claims, it is necessary for us to cement their protection internationally.

### III. Possible solutions to address the gap

26 As earlier argued, the Convention’s definition of a refugee does not encompass asylum-seekers fleeing from generalised violence despite

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Michelle Foster, *The Law on Refugee Status* (Cambridge University Press, 2nd Ed, 2014) at p 1.

94 Kate Jastram & Marilyn Achiron, *Refugee Protection: A Guide to International Refugee Law* (Inter-Parliamentary Union, 2001) at p 46.

95 Vanessa Holzer, *Refugees from Armed Conflict: The 1951 Refugee Convention and International Humanitarian Law* (Intersentia, 2015) at p 43.

96 Kate Jastram & Marilyn Achiron, *Refugee Protection: A Guide to International Refugee Law* (Inter-Parliamentary Union, 2001) at p 45.

97 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85 (entered into force 26 June 1987) Art 3.

98 Kate Jastram & Marilyn Achiron, *Refugee Protection: A Guide to International Refugee Law* (Inter-Parliamentary Union, 2001) at p 47.

99 Frits Karlsruhoven & Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (Cambridge University Press, 2011) at p 1; Vanessa Holzer, *Refugees from Armed Conflict: The 1951 Refugee Convention and International Humanitarian Law* (Intersentia, 2015) at p 46; see also Erika Feller, “Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come” (2006) 18(3–4) *International Journal of Refugee Law* 509 at 525.

them being deserving of refugee protection. This part will evaluate three possible solutions to address this gap: (a) re-interpreting the Convention to encompass those fleeing from generalised violence; (b) strengthening alternative frameworks to the Convention; and (c) expanding the refugee definition to include such individuals as mentioned in (a).

### A. *Re-interpreting the Convention*

27 Some academics opine that the problem does not lie in the text of the Convention but rather in the absence of the machinery and processes in place to implement it.<sup>100</sup> Hence, they argue that a liberal interpretation of the Convention may resolve this protection gap for those fleeing generalised violence. Under a restrictive interpretation, the Convention may provide more leeway to countries which take harsh measures against terrorist, insurgency or secessionist movements in their territory, on the basis that the ill-treatment is not attributable to the dissidents' political opinions but their "desire to protect the integrity of the State".<sup>101</sup> Yet, this ignores the complex links between opposition groups and their racial, ethnic, political or religious character, and effectively nullifies refugee claimants from Syria today or Sri Lanka in the past.

28 In contrast, under the liberal interpretation, the Convention would recognise refugee claims in situations when "the measures taken [by the State] are disproportionate", "not necessitated by compelling reasons" or "affect persons who are defenceless".<sup>102</sup> This provides greater protection by preventing states from operating under the unacceptably wide mandate of "protect[ing] the integrity of the State". Walter Kälin defended this position by arguing that the restrictive interpretation violates the principle of *effet utile*, as both the Convention and Protocol were "adopted in order to solve refugee problems in a human rights spirit".<sup>103</sup> The principle of *effet utile* has been adopted by regional courts in interpreting human rights treaties.<sup>104</sup> Emphasis is placed on the object

100 Pierre-Michel Fontaine, "The 1951 Convention and the 1967 Protocol Relating to the Status of Refugees: Evolution and Relevance for Today" (2007) 2 *Intercultural Hum Rts L Rev* 149 at 159–160; Volker Türk, "Protection Gaps in Europe? Persons Fleeing the Indiscriminate Effects of Generalised Violence", speech delivered at UNHCR's Commemorations Year in Europe Launch Forum (18 January 2011) at p 6.

101 Walter Kälin, "Refugees and Civil Wars: Only a Matter of Interpretation?" (1991) 3 *International Journal for Refugee Law* 435 at 439.

102 Walter Kälin, "Refugees and Civil Wars: Only a Matter of Interpretation?" (1991) 3 *International Journal for Refugee Law* 435 at 441.

103 Walter Kälin, "Refugees and Civil Wars: Only a Matter of Interpretation?" (1991) 3 *International Journal for Refugee Law* 435 at 447.

104 *Klass v Germany* App no 5029/71 (ECtHR, 6 September 1978) at [34]; *Viviana Gallardo (Costa Rica)*, Judgment, Inter-Am Ct HR (ser A) No 101, ¶ 16 (cont'd on the next page)

and purpose of such treaties to ensure effective protection of the guaranteed rights.<sup>105</sup> Hence, adopting a liberal interpretation of the Convention would be consistent with how other human rights treaties are presently interpreted. Kälin also contended that the restrictive interpretation relies on the “subjective intention of the agents of persecution”, which is very difficult to determine or pin down on a specific individual. Instead, the liberal interpretation “rests on an objective view” of the persecution inflicted on the victim, and better coheres with current practice by international courts when making decisions on limiting international human and economic rights.<sup>106</sup>

29 Kälin’s argument is useful in demonstrating how asylum-seekers fleeing civil wars could plausibly be granted refugee protection. But while his approach could alleviate the difficulty in proving that the aggressor was not pursuing a legitimate objective and was instead targeting select individuals or groups of individuals, it does not address the two other problems identified earlier – violence is sometimes indiscriminate, and discriminate violence may not be for reasons of the five Convention grounds.<sup>107</sup> This is because a liberal re-interpretation retains the notion of persecution and the Convention grounds as necessary for attaining refugee protection. The very notion of *effet utile* would hold against extending protection to these people if the core of the refugee definition within the Convention is still retained. Moreover, the drafters of the Convention had expressly rejected the International Committee of the Red Cross’s recommendation to ensure “[e]very person forced by grave events to seek refuge outside his country of ordinary residence is entitled to be received”.<sup>108</sup> Viewed in this light, it is necessary to look outside of the Convention.

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(1 July 1981); *Mapiripán Massacre v Columbia*, Merits, Reparations and Costs, Judgment, Inter-Am Ct HR (ser C) No 134, ¶ 105 (15 September 2005); *Yakye Axa Indigenous Community v Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am Ct HR (ser C) No 125, ¶ 101 (17 June 2005); *Korbely v Hungary* App no 9174/02 (ECtHR, 19 September 2008) at [67]; see also Laurence Burgorgue-Larsen Amaya Úbeda de Torres, *The Inter-American Court of Human Rights: Case Law and Commentary* (Oxford University Press, 2011) at para 14.03 and Helmut Philipp Aust & Georg Nolte, *The Interpretation of International Law by Domestic Courts* (Oxford University Press, 2016) at p 162.

105 Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (Martinus Nijhoff Publishers, 2010) at pp 429–430.

106 Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (Martinus Nijhoff Publishers, 2010) at p 449.

107 See paras 8–13 and 18–20 above.

108 United Nations, General Assembly, *Aide-Memoire on the Refugee Question*, A/CONF.2/NGO.2 (4 July 1951) at p 1.

## **B. *Strengthening alternative frameworks to the Convention***

### *(1) Encouraging the development of regional instruments*

30 As mentioned, the OAU Convention, Cartagena Declaration, and Bangkok Principles have expanded the Convention's refugee definition to include those fleeing from generalised violence. UNHCR could promote "a wider accession to, and more uniform implementation" of these documents and "use them as examples on which States elsewhere might wish to draw in developing their own national legislation".<sup>109</sup> However, there are two main problems to this approach. First, this solution was considered back in 1992,<sup>110</sup> but no other regional frameworks have since emerged and the non-binding agreements still have not acquired legal force. Hence, even if UNHCR persists in encouraging states to formulate or strengthen such regional agreements, it is unlikely to lead to any fruitful outcomes in the foreseeable future.

31 Secondly, even if some regions formulate binding regional agreements that expand the refugee definition to include asylum-seekers fleeing generalised violence, this will be insufficient to cope with the existing refugee outflows. Without an international burden-sharing scheme, these regions must absorb the entire flow of asylum-seekers in their jurisdictions. For some regions, this is simply unsustainable due to the overwhelming number of asylum-seekers, and will eventually overwhelm states' capacities to accommodate these refugees. This is evident from how African states, which are economically saddled with large numbers of refugees due to their relatively generous refugee definition, have since become more reluctant to take in asylum-seekers.<sup>111</sup> This represents a classic case of a free rider problem – expanding the definition of refugees through regional instruments will only result in the countries within that region receiving more refugees. As asylum-seekers head to these countries instead of others which are less accommodating, these other regions become less incentivised to develop their own regional instruments for refugees. The only method to ensure a fair distribution of responsibilities is to develop an international instrument for refugee protection, and not to rely solely on regional ones.

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109 United Nations High Commissioner for Refugees, *Report of the Working Group on Solutions and Protection to the 42nd Session of the Executive Committee of the High Commissioner's Programme*, EC/SCP/64 (11 October 1991) at para 55(b).

110 UNHCR, "Protection of Persons of Concern to UNHCR Who Fall Outside the 1951 Convention: A Discussion Note" (UN Doc EC/1992/SCP/CRP.5, 1992) at para 6.

111 See, eg, paras 12 and 14–17 above.

(2) *Encouraging the development of complementary protection legislations*

32 Complementary protection refers to protection granted to persons who do not qualify as refugees under the Convention but to whom states have afforded protection because they are at risk of serious human rights violations in their home countries.<sup>112</sup> In other words, it is possible for protection to be afforded to asylum-seekers fleeing generalised violence under these frameworks instead of expanding the refugee definition in the Convention. UNHCR could encourage states to adopt such frameworks over time, thereby strengthening this alternative framework that will protect those fleeing generalised violence.

33 There appears to be an increasing adoption of complementary protection internationally, with states such as Canada, Mexico and Australia codifying this obligation in domestic legislations.<sup>113</sup> Notwithstanding this, “the actual features of the scheme, and the degree of protection afforded, can differ significantly”.<sup>114</sup> For instance, Mexico’s complementary protection legislation protects asylum-seekers as long as their life, security or liberty is at threat from generalised violence, foreign aggression, internal conflict, mass violations of human rights, or other circumstances that have seriously disturbed public order.<sup>115</sup> In contrast, both Australia’s and Canada’s legislations do not extend protection to asylum-seekers fleeing generalised violence. Australia’s legislation does not offer protection where the risk of harm “is one faced by the population of the country generally and is not faced by the non-citizen personally”.<sup>116</sup> Canada’s legislation also excludes protection where the risk is “faced generally by other individuals or from that country”.<sup>117</sup>

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112 Nicole Dicker & Joanna Mansfield, “Filling the Protection Gap: Current Trends in Complementary Protection in Canada, Mexico and Australia”, *New Issues in Refugee Research* (May 2012) at p 1.

113 Nicole Dicker & Joanna Mansfield, “Filling the Protection Gap: Current Trends in Complementary Protection in Canada, Mexico and Australia”, *New Issues in Refugee Research* (May 2012) at pp 5–6 and 9–13.

114 Nicole Dicker & Joanna Mansfield, “Filling the Protection Gap: Current Trends in Complementary Protection in Canada, Mexico and Australia”, *New Issues in Refugee Research* (May 2012) at pp 12–13.

115 Law on Refugees and Complementary Protection and Political Asylum, (Mexico), (signed into force by President Calderon on 26 January 2011) s 2, Art 13; see also Nicole Dicker & Joanna Mansfield, “Filling the Protection Gap: Current Trends in Complementary Protection in Canada, Mexico and Australia”, *New Issues in Refugee Research* (May 2012) at p 17.

116 Migration Act 1958 (Cth) s 36(2)(2B); see also Nicole Dicker & Joanna Mansfield, “Filling the Protection Gap: Current Trends in Complementary Protection in Canada, Mexico and Australia”, *New Issues in Refugee Research* (May 2012) at p 17.

117 Immigration and Refugee Protection Act (SC 2001, c 27) (Canada) s 97(1)(b)(ii); see also Nicole Dicker & Joanna Mansfield, “Filling the Protection Gap: Current  
(cont’d on the next page)

34 This different treatment of the same group of asylum-seekers under the various complementary protection legislations is attributable to the lack of any binding international agreement on complementary protection. This indicates that there is a need to develop a “uniform standard for the granting of complementary protection”.<sup>118</sup> The lack of a binding international agreement on complementary protection means that such protection is offered on an *ad hoc* basis and dependent on executive discretion most evident from how some states do not even have such legislations. As such, these *ad hoc* measures “may not always be sufficient to meet the needs of all those requiring international protection and assistance”.<sup>119</sup> This means that for the strengthening of alternative frameworks to be effective in protecting refugees fleeing generalised violence, UNHCR has to formulate a binding international agreement to regulate such alternatives. Yet, if this is politically feasible, why is it not viable to just broaden the refugee definition in the Convention?

### C. *Expanding the definition of a refugee*

35 Given that re-interpretation is ineffective in extending protection to those fleeing generalised violence, and strengthening alternative frameworks is only effective if there is a binding agreement, there is a clear impetus for an expansion of the current definition of refugees to include these individuals. The difficulty arises in settling on a clear definition that best balances the need to offer those in dire circumstances protection and to not overtax states by setting too low a threshold. This subpart will begin by considering why there has not been such an expansion before addressing two main concerns with incorporating generalised violence into the refugee definition. It then proposes a test for determining when there is generalised violence, as well as supplementary obligations to support the expansion.

#### (1) *Reasons for lack of such an expansion thus far*

36 Even though UNHCR has never pushed for an expansion of the refugee definition in the Convention, this is not a reason against advocating for such a position. Notably, UNHCR, albeit not suggesting an expansion, has expanded its own mandate to cater to persons fleeing

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Trends in Complementary Protection in Canada, Mexico and Australia”, *New Issues in Refugee Research* (May 2012) at p 17.

118 Nicole Dicker & Joanna Mansfield, “Filling the Protection Gap: Current Trends in Complementary Protection in Canada, Mexico and Australia”, *New Issues in Refugee Research* (May 2012) at pp 12–13.

119 United Nations High Commissioner for Refugees, *Report of the Working Group on Solutions and Protection to the 42nd Session of the Executive Committee of the High Commissioner’s Programme*, EC/SCP/64 (11 October 1991) at para 54(d).

from generalised violence.<sup>120</sup> This explains why UNHCR has, in the past, criticised Australia for its failure to secure protection for persons fleeing the indiscriminate effects of violence associated with armed conflicts via its domestic complementary protection legislation.<sup>121</sup> This is perhaps an implicit acknowledgment, even on the part of UNHCR, that these individuals deserve refugee protection. However, one reason why UNHCR has never expressly advocated for an expansion could be that such a proposal must come at an opportune moment with sufficiently broad political will and agreement for change. Otherwise, UNHCR would have exhausted its political capital for naught.

37 Another reason for the lack of a suggestion to expand the definition by UNHCR is that political will is currently being expended on other problems with the Convention. As reflected in the recent New York Declaration for Refugees and Migrants<sup>122</sup> (“NY Declaration”), the focus is presently for states to strengthen existing mechanisms guaranteeing the rights of Convention refugees.<sup>123</sup> States have been turning away asylum-seekers at their borders,<sup>124</sup> and refugees are receiving poor treatment even after acceptance by states due to xenophobic sentiments towards them,<sup>125</sup> especially with the rise of terrorism today.<sup>126</sup> To consider an expansion would detract from the

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120 United Nations High Commissioner for Refugees, *Note on International Protection* (UN Doc A/AC.96/830, 7 September 1994) at paras 30–32; UNHCR, “Note on the Mandate of the High Commissioner for Refugees and His Office” (1 October 2013) at p 3; see also Erika Feller, “The Evolution of the International Refugee Protection Regime” (2001) 5 JL & Pol’y 129 at 132 and Laura Barnett, “Global Governance and the Evolution of the International Refugee Regime” (2002) 14(2–3) *International Journal of Refugee Law* 238 at 248 and 250.

121 UNHCR, “Draft Complementary Protection Visa Model: Australia – UNHCR Comments” (2009) at para 13; see also Nicole Dicker & Joanna Mansfield, “Filling the Protection Gap: Current Trends in Complementary Protection in Canada, Mexico and Australia”, *New Issues in Refugee Research* (May 2012) at p 17.

122 General Assembly Resolution 71/1, *New York Declaration for Refugees and Migrants*, A/RES/71/1 (resolution adopted by the General Assembly on 19 September 2016).

123 General Assembly Resolution 71/1, *New York Declaration for Refugees and Migrants*, A/RES/71/1 (resolution adopted by the General Assembly on 19 September 2016) at paras 24–33, 65, 67 and 70–71.

124 Alice Edwards, “Human Rights, Refugees, and the Right ‘to Enjoy’ Asylum” (2005) 17(2) *International Journal of Refugee Law* 293 at 293–294.

125 Volker Türk & Frances Nicholson, “Refugee Protection in International Law: An Overall Perspective” in *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Erika Feller, Volker Türk & Frances Nicholson eds) (Cambridge University Press, 2003) at p 4; Alice Edwards, “Human Rights, Refugees, and the Right ‘to Enjoy’ Asylum” (2005) 17(2) *International Journal of Refugee Law* 293 at 294.

126 Erika Feller, “Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come” (2006) 18(3–4) *International Journal of Refugee Law* 509 at 519–522; Peter Yeung, “Refugee Crisis: Majority of Europeans Believe  
(cont’d on the next page)



current problems that are plaguing the implementation of the Convention. While these are legitimate concerns, UNHCR's efforts do not deal with the fundamental problem of the Convention – the systematic denial of legitimate asylum-claims by people fleeing generalised violence. It is therefore critical for the international community to concede that this gap of protection exists and to address it by expanding the definition.

(2) *Concerns about generalised violence*

38 Expanding the refugee definition to include generalised violence may also not be as straightforward as first assumed. One concern is that generalised violence “deflects attention from the underlying causes, character and impact of the violence” by construing the violence as indiscriminate and untargeted.<sup>127</sup> A potential argument by opponents against such an expansion is that most cases of generalised violence can be linked to a ground provided in the Convention, and there is no real need to expand the definition to include those fleeing generalised violence because a link to one of the Convention grounds is regularly present when asylum-seekers flee from such conflicts.<sup>128</sup> However, as addressed earlier, this argument does not precisely address the problem given that there are obvious cases where violence is genuinely indiscriminate and untargeted. Further, even if violence is discriminate, it may be for reasons beyond the Convention or it may be difficult to prove that an individual was targeted for one of the five grounds.

39 Another concern behind defining the scope of generalised violence, voiced by UNHCR, is that one should not rely on the IHL's classification of armed conflicts. Relying on this classification is useful in so far as it assesses the levels of violence in a country and determines when it rises to the level of generalised violence.<sup>129</sup> However, declaring a

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Increased Migration Raises Terror Threat, Survey Says”, *Independent Europe* (12 July 2016); Lydia Gall, “Hungary’s War on Refugees”, *Human Rights Watch* (16 September 2016); Mark Reagan, “Gov Abbott Flames Xenophobic Anti-refugee Sentiment in Wake of Paris Attack”, *San Antonio Current* (16 November 2015).

127 UNHCR & Council of Europe, “Joint UNHCR/Council of Europe Colloquium on the Role of Regional Human Rights Courts in Interpreting and Enforcing Legal Standards for the Protection of Forcibly Displaced Persons: Conference Report” (15 & 16 June 2011) at p 67.

128 UNHCR & Council of Europe, “Joint UNHCR/Council of Europe Colloquium on the Role of Regional Human Rights Courts in Interpreting and Enforcing Legal Standards for the Protection of Forcibly Displaced Persons: Conference Report” (15 & 16 June 2011) at p 65.

129 Hugo Storey & Rebecca Wallace, “War and Peace in Refugee Law Jurisprudence” (2001) 95(2) *American Journal of International Law* 349 at 359; Vanessa Holzer, “Legal and Protection Policy Research Series: The 1951 Refugee Convention and

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situation as an armed conflict would legitimise conduct that may harm civilians.<sup>130</sup> Moreover, it is unclear if generalised violence, and hence refugee protection for individuals fleeing conflicts, should be limited to cases of armed conflicts. For instance, the situation in Mexico involving drug cartels and armed government forces could arguably not rise to the level of armed conflicts. Yet, for residents in Chihuahua, which face an alarmingly high homicide rate,<sup>131</sup> being caught between both sides can cause violence to escalate to unacceptably high levels, especially with the indiscriminate methods of warfare adopted by the drug cartels.<sup>132</sup>

40 Hence, the reliance on the classification of armed conflict is a relevant concern that should be factored in when drawing the contours of generalised violence. However, one does not need to rule out the relevance of IHL entirely. IHL is a crucial consideration in shaping refugee law in relation to generalised violence since generalised violence typically occurs during wartime, which is governed by IHL.<sup>133</sup> A possible incorporation of IHL into refugee law, proposed by Hugo Storey, is that while generalised violence should not be equated to the IHL characterisation of armed conflicts, violations of peremptory norms can serve as obvious instances of generalised violence.<sup>134</sup> An example, provided in the case of *AM & AM v Secretary of State for the Home Department*<sup>135</sup> (“*AM & AM*”), noted that combatants which knowingly involve or target civilians as part of their warfare strategies pose additional risks to civilians “over and above the ordinary incidents of [warfare]”, which therefore can be viewed as persecutory conduct.<sup>136</sup> UNHCR has accepted that IHL violations can constitute factors for determining an individual’s refugee status, but it also clarified that these situations fall outside of the Convention’s refugee definition.<sup>137</sup> All things

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the Protection of People Fleeing Armed Conflict and Other Situations of Violence”, *Legal and Protection Policy Research Series* (September 2012) at p 19.

130 Vanessa Holzer, “Legal and Protection Policy Research Series: The 1951 Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence”, *Legal and Protection Policy Research Series* (September 2012) at p 19.

131 Sam Tabor, “Rural Chihuahua, Mexico Still Cartel Battleground”, *InSight Crime* (7 October 2015).

132 Jeremy Bender, “Mexico’s Drug War is Getting Even Worse”, *Business Insider* (14 May 2015).

133 International Committee of the Red Cross, *Advisory Service on International Humanitarian Law: What is International Humanitarian Law?* (September 2004); International Committee of the Red Cross, *War & Law*, available at <https://www.icrc.org/en/war-and-law> (accessed 7 December 2017).

134 Hugo Storey, “Armed Conflict in Asylum Law: The ‘War-Flaw’” (2012) 31(2) *Refugee Survey Quarterly* 1 at 21.

135 [2008] UKAIT 91.

136 *AM & AM v Secretary of State for the Home Department* [2008] UKAIT 91 at [76].

137 UNHCR, “UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Somalia” (5 May 2010) at p 39.

considered, asylum-seekers fleeing from IHL violations presently only qualify for protection under frameworks outside the Convention.

(3) *The test for determining generalised violence*

41 In circumscribing the test for generalised violence, it is important to evaluate the current regional conventions that enable persons fleeing from generalised violence to qualify for refugee protection, namely, the OAU Convention and the Directive. The OAU Convention's definition of a refugee, which states that a refugee is one who is compelled to leave his country "owing to external aggression, occupation, foreign domination, or events seriously disturbing public order",<sup>138</sup> appears to cover asylum-seekers fleeing from generalised violence, as they can fall within the last category. But there are at least two problems with adopting this definition. Firstly, the categories are not clearly defined in international law.<sup>139</sup> Even though academics have attempted to define the terms,<sup>140</sup> these attempts are ultimately not binding and subject to judicial interpretation in Africa, which is currently underdeveloped.<sup>141</sup> There is also no consistent state practice that informs the terms,<sup>142</sup> so adopting this definition may lead to shaky grounds for refugee protection.

42 Secondly, the assessment of refugee status is not done on an entirely objective basis.<sup>143</sup> The notion of being "compelled" to leave suggests that the motive for an individual's flight must be examined.<sup>144</sup>

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138 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (10 September 1969) UNTS 14691 (entered into force 20 January 1974) Art I(2).

139 Eduardo Arboleda, "Refugee Definition in Africa and Latin America: The Lessons of Pragmatism" (1991) 3(2) *International Journal of Refugee Law* 185 at 195; Marina Sharpe, "The 1969 African Refugee Convention: Innovations, Misconceptions and Omissions" (2012) 58(1) *McGill LJ* 95 at 112.

140 Micah Rankin, "Extending the Limits or Narrowing the Scope? Deconstructing the OAU Refugee Definition Thirty Years On", *New Issues in Refugee Research* (April 2005) at pp 4–9; Alice Edwards, "Refugee Status Determination in Africa" (2006) 14(2) *African Journal of International and Comparative Law* 204 at 212–220; Marina Sharpe, "The 1969 African Refugee Convention: Innovations, Misconceptions and Omissions" (2012) 58(1) *McGill LJ* 95 at 112.

141 Marina Sharpe, "The 1969 African Refugee Convention: Innovations, Misconceptions and Omissions" (2012) 58(1) *McGill LJ* 95 at 112.

142 See the different definitions, as well as inconsistent state practice, arising from various alternative frameworks in paras 15–17 above.

143 Marina Sharpe, "The 1969 African Refugee Convention: Innovations, Misconceptions and Omissions" (2012) 58(1) *McGill LJ* 95 at 116.

144 George Okoth-Obbo, "Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa" (2001) 20(1) *Refugee Survey Quarterly* 1 at 116; Alice Edwards, "Refugee Status Determination in Africa" (2006) 14(2) *African Journal of International and Comparative Law* 204 at 228.

Asylum-seekers must have fled as a “direct consequence of a risk of harm to the individual stemming from the 1969 Event” provided for in the OAU Convention.<sup>145</sup> While this prevents asylum-seekers from receiving protection for reasons unconnected to the event in question,<sup>146</sup> it “reintroduces the problematic question of motive of flight which [the OAU Convention] is otherwise credited with having disabused from the refugee definition”.<sup>147</sup>

43 Under the Directive, member states must afford refugee protection to every individual who faces “serious and individual threat[s] to [his] life or person by reason of indiscriminate violence in situations of international or internal armed conflict”.<sup>148</sup> This was devised to provide subsidiary protection, which is substantially equivalent to refugee protection, for individuals who did not qualify as refugees.<sup>149</sup> Hence, the test for indiscriminate violence used by the European Court of Human Rights (“ECtHR”) in *Sufi and Elmi v The United Kingdom*<sup>150</sup> (“*Sufi*”) served to provide broader legal protections to asylum-seekers who did not qualify as Convention refugees.<sup>151</sup> There are four limbs in the *Sufi* test:<sup>152</sup> (1) whether the parties to the conflict were either employing methods and tactics of warfare which increased the risk of civilian casualties or directly targeting civilians; (2) whether the use of such methods and/or tactics was widespread among the parties to the conflict; (3) whether the fighting was localised or widespread; (4) the number of civilians killed, injured and displaced as a result of the fighting.

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145 Marina Sharpe, “The 1969 African Refugee Convention: Innovations, Misconceptions and Omissions” (2012) 58(1) McGill LJ 95 at 118.

146 Alice Edwards, “Refugee Status Determination in Africa” (2006) 14(2) *African Journal of International and Comparative Law* 204 at 227.

147 George Okoth-Obbo, “Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa” (2001) 20(1) *Refugee Survey Quarterly* 1 at 116.

148 “Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted” [2004] *Official Journal of the European Union* 12, Art 15(c).

149 “Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted” [2004] *Official Journal of the European Union* 12, Art 2(e).

150 App nos 8319/07 and 11449/07 (ECtHR, 28 June 2011).

151 John Kelly, “A Judicial Analysis of Article 15(c) of the Qualification Directive and International Protection Issues” *Electronic Immigration Network* (2 April 2015).

152 *Sufi and Elmi v The United Kingdom*, App nos 8319/07 and 11449/07 (ECtHR, 28 June 2011) at [242].

44 The test is envisioned to protect only those fleeing extreme situations of generalised violence.<sup>153</sup> This is because proof of generalised violence serves as an alternative to proof of specific and personal threats of violence.<sup>154</sup> This article proposes to adopt the test for generalised violence used by ECtHR in *Sufi* for the following reasons. Firstly, the high threshold in the *Sufi* test should be adopted for the granting of refugee status. Generalised violence, justifying the grant of refugee protection, should be of such a high intensity that any civilian, solely because of their presence in the specific region or country, would face a genuine risk of being subject to grave harm.<sup>155</sup> This is because generalised violence serves as an alternative to specific and individualised fear of persecution. The upshot is that for individuals to claim that the effect of general violence is akin to that of being specifically persecuted for one of the five Convention grounds, they must be facing severe violence. This is necessary given the political will that is needed for states to be on board with this expansion. This also serves to strike an appropriate balance between protecting those in dire circumstances fleeing conflicts and not overtaxing states unnecessarily.

45 Secondly, this test is flexible enough to encompass both armed conflicts and otherwise. This is essential as situations of generalised violence are not necessarily confined to armed conflicts.<sup>156</sup> This flexibility ensures that the definition of generalised violence remains relevant in future developments of civil conflicts, which appears to tend towards violence by non-state actors. A potential rejoinder is that Art 15(c) of the Directive, pursuant to which the *Sufi* test was formulated, implies a reliance on IHL as it contains the term “armed conflict”. This may restrict the applicability of the *Sufi* test to armed conflicts and exclude situations where violence is of a high degree but the situation does not qualify as an armed conflict, and it may thus be problematic to import this test into refugee law that deals with both armed and non-armed conflicts. However, the European Court of Justice has clarified that “armed conflict” does not rely on IHL concepts

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153 *NA v UK* App no 25904/07 (ECtHR, 17 July 2008) at [115]; see also Volker Türk, “Protection Gaps in Europe? Persons Fleeing the Indiscriminate Effects of Generalised Violence”, speech delivered at UNHCR’s Commemorations Year in Europe Launch Forum (18 January 2011) at p 7.

154 Case C-465/07 *Meki Elgafaji v Staatssecretaris van Justitie* [2009] ECR I-921 at [38]; Case C-285/12 *Aboubacar Diakité v Commissaire Général aux Réfugiés et aux Apatrides* [2014] ECLI:EU:C:2014:39 at [31].

155 Case C-465/07 *Meki Elgafaji v Staatssecretaris van Justitie* [2009] ECR I-921 at [43]; Evangelia Lilian Tsourdi, “What Protection for Persons Fleeing Indiscriminate Violence? The Impact of the European Courts on the EU Subsidiary Protection Regime” in *Refugee from Inhumanity? War Refugees and International Humanitarian Law* (David Cantor & Jean-François Durieux eds) (Brill Nijhoff, 2014) at p 277.

156 See, eg, paras 9–11 above.

to determine the level of violence in the country.<sup>157</sup> Hence, the *Sufi* test can be transplanted into refugee law.

46 Thirdly, this test has already been adopted and used by competent courts. It has been applied once by the Asylum and Immigration Tribunal in *AM & AM*, and once by ECtHR in *Sufi*. Refugee-status determination will be less uncertain since courts have previously explained how they arrived at their findings of generalised violence in these cases.

(4) *Formulating supplementary obligations to support this expansion*

47 The expansion of the refugee definition would inevitably lead to an increase in international refugee intake, though this increase would not be equitably distributed amongst all states: states physically proximate to the conflict zones will be prone to receiving most of these refugees.<sup>158</sup> Yet, given that the current system of unilateral, undifferentiated obligations, where states individually deal with asylum-seekers arriving at their borders, is “unfair and unsustainable”,<sup>159</sup> it is necessary to support the definition’s expansion with a supplementary obligation of international co-operation through burden-sharing. The need for international co-operation to support refugee outflows is also echoed by states in the NY Declaration, where states “commit to a more equitable sharing of the burden and responsibility for hosting and supporting the world’s refugees”.<sup>160</sup>

48 This international co-operation is currently lacking in both the Convention and in practice. While the principle of burden-sharing is in the preamble of the Convention,<sup>161</sup> the preamble is not legally binding on states parties. Further, whilst states have supported the notion of burden-sharing, the actual implementation of burden-sharing has been

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157 *Aboubacar Diakité v Commissaire Général aux Réfugiés et aux Apatrides* [2014] ECLI:EU:C:2014:39 at [35].

158 General Assembly Resolution 71/1, *New York Declaration for Refugees and Migrants*, A/RES/71/1 (resolution adopted by the General Assembly on 19 September 2016) at para 7.

159 James C Hathaway & R Alexander Neve, “Making International Refugee Law Relevant Again: A Proposal for Collectivised and Solution-Oriented Protection” (1997) 10 Harv Hum Rts J 115 at 143.

160 General Assembly Resolution 71/1, *New York Declaration for Refugees and Migrants*, A/RES/71/1 (resolution adopted by the General Assembly on 19 September 2016) at para 68.

161 Convention Relating to the Status of Refugees (28 July 1951) 189 UNTS 137 (entered into force 22 April 1954) Preamble, at para 4.

*ad hoc* and usually insufficient.<sup>162</sup> A possible framework of burden-sharing to adopt is a collectivised “common but differentiated responsibility” towards refugees that deals with how to provide protection to refugees and distribute the financial costs of such protection.<sup>163</sup> All states must agree to contribute, not necessarily in identical measures, to protecting refugees that are accepted into any state.<sup>164</sup> The rationale is that it is “unrealistic to expect all states to make an identical contribution both to receiving refugees and to financing the costs of the protection regime”.<sup>165</sup> Hence, the distribution of responsibility should be based on allocation principles, where the comparative abilities and circumstances of states are considered. The consequence is that states receiving refugees are no longer independently coping with refugee inflows. Instead, they will have “access to a system that would fairly distribute refugee protection responsibilities”.<sup>166</sup> This particular framework of burden-sharing has been widely adopted to deal with environmental degradation.<sup>167</sup> For instance, the Kyoto Protocol to the United Nations Framework Convention on Climate Change<sup>168</sup> adopted differing approaches to the reduction of carbon emissions for developed and developing countries. While developed countries were expected to reduce their emissions based on pre-agreed targets, developing countries were only expected to

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162 James C Hathaway & R Alexander Neve, “Making International Refugee Law Relevant Again: A Proposal for Collectivised and Solution-Oriented Protection” (1997) 10 Harv Hum Rts J 115 at 117.

163 James C Hathaway & R Alexander Neve, “Making International Refugee Law Relevant Again: A Proposal for Collectivised and Solution-Oriented Protection” (1997) 10 Harv Hum Rts J 115 at 144–145.

164 James C Hathaway & R Alexander Neve, “Making International Refugee Law Relevant Again: A Proposal for Collectivised and Solution-Oriented Protection” (1997) 10 Harv Hum Rts J 115 at 145.

165 James C Hathaway & R Alexander Neve, “Making International Refugee Law Relevant Again: A Proposal for Collectivised and Solution-Oriented Protection” (1997) 10 Harv Hum Rts J 115 at 145.

166 James C Hathaway & R Alexander Neve, “Making International Refugee Law Relevant Again: A Proposal for Collectivised and Solution-Oriented Protection” (1997) 10 Harv Hum Rts J 115 at 146.

167 United Nations, General Assembly, United Nations Conference on Environment and Development, *The Rio Declaration on Environment and Development* (1992), A/CONF.151/26 (vol 1) (3–14 June 1992) principle 7; United Nations, Framework Convention on Climate Change, 21st Session, Conference of the Parties, *Adoption of the Paris Agreement*, FCCC/CP/2015/L.9/Rev.1 (30 November–11 December 2015) Preamble at para 3, Arts 2(2), 4(3) and 4(19); Estefanía Jiménez, “The Principle of Common but Differentiated Responsibilities and Respective Capabilities (CBDR&RC) and the Compliance Branch of the Paris Agreement”, Organization of American States.

168 Adopted on 11 December 1997; entered into force on 16 February 2005.

report their emissions.<sup>169</sup> Even amongst the developed countries, each state had different pre-agreed targets, taking into account the unique circumstances they were in.<sup>170</sup> Further, developed countries had the added responsibility of providing developing countries with financial resources, including the transfer of technology.<sup>171</sup> This allowed for developing countries to take a slower but monitored approach to carbon emissions reduction in contrast to developed countries who were expected to meet certain pre-agreed targets. Hence, future considerations such as how to structure a framework to cope with refugee outflows can take into account existing case studies from the environmental field.

49 The allocation of refugee protection responsibilities amongst states is definitely a Herculean task. However, acknowledging the need to distribute such protection and catalysing discourse on this matter is a necessary step forward. States have acknowledged this in relation to current refugee outflows, stating that they need to “tak[e] account of existing contributions and the differing capacities and resources among States”.<sup>172</sup> This allocation can be spearheaded by UNHCR in close co-ordination with states.

#### IV. Application of the proposed expanded definition

##### A. Applying the Sufi test to two hypothetical scenarios

50 To illustrate how the proposed expanded definition will be applied to potential cases, this part will apply the *Sufi* test to two hypothetical scenarios: an asylum-seeker fleeing the Syrian conflict; and an asylum-seeker fleeing the Boko Haram conflict. Although these scenarios are hypothetical, the facts of the case are drawn from and reflect the harsh realities that many asylum-seekers face in today’s refugee crises. Consider first the fictional case of A, an asylum-seeker from Syria:

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169 Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted on 11 December 1997; entered into force on 16 February 2005) Arts 3(1) and 10.

170 “A Summary of the Kyoto Protocol”, *United Nations Framework Convention on Climate Change* (2014) <[http://unfccc.int/kyoto\\_protocol/background/items/2879.php](http://unfccc.int/kyoto_protocol/background/items/2879.php)> (accessed 7 December 2017).

171 Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted on 11 December 1997; entered into force on 16 February 2005) Art 11.

172 General Assembly Resolution 71/1, *New York Declaration for Refugees and Migrants*, A/RES/71/1 (resolution adopted by the General Assembly on 19 September 2016) at para 68.



A has lived in Aleppo, Syria since birth. Like most of Aleppo's inhabitants, A is a Sunni Muslim, in contrast to the ruling Alawite regime of Syria. Despite the outbreak of civil war in 2011, A was determined to remain in Aleppo as he thought that the rebel forces, aided by foreign powers, would easily topple Assad's regime. However, the rebels could not capitalise on their momentum and the civil war eventually became a battle of attrition between the Government and opposition forces. With the rapid deterioration of social and economic conditions in Aleppo, A finally made the decision to leave Aleppo and seek refugee status in Europe. He is currently located in Berlin, Germany, and is now awaiting the outcome of the refugee status determination by the German authorities.

51 Consider next the fictional case of B, an asylum-seeker from Nigeria:

B has lived in Baga since moving from Lagos ten years ago. Since Boko Haram began growing in strength and audacity, B's life has worsened as the town faced constant threats of an attack by Boko Haram, which also hurt commerce. In April 2013, B fortunately escaped from the Baga massacre as they were away during that month. However, when he returned, he found his house and belongings in flames. In January 2015, B once again barely managed to flee Boko Haram in the second Baga massacre, and this was the final straw which led him to flee to Cameroon in hopes of leaving Baga and Nigeria, where he is currently waiting for his refugee status to be approved.

52 Although these two scenarios are hypothetical examples, many details of both situations are drawn from the actual stories of Syrian and Nigerian asylum-seekers, and the factual matrices are actually quite similar to many real asylum-seekers. We now proceed to apply the *Sufi* test to these two hypothetical scenarios.

(1) *Whether parties to the conflict were either employing methods and tactics of warfare that increased risk of civilian casualties or directly targeting civilians*

53 There are numerous instances of indiscriminate methods of warfare adopted by the Syrian government. For example, the Human Rights Watch reported that government helicopters had "dropped barrel bombs with toxic chemicals on two residential neighbourhoods in opposition-controlled parts of Aleppo".<sup>173</sup> For another example, the largest hospital in the rebel-held areas of Aleppo was severely damaged by barrel and cluster bombs.<sup>174</sup> Furthermore, Russian and Syrian forces have sustained continuous mortar-shelling and airstrikes on the

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173 "Syria: New Deadly Chemical Attacks", *Human Rights Watch* (28 September 2016).

174 Jamie Grierson, "Syria: Aleppo Hospital Hit by Barrel Bombs and Cluster Bombs, Reports Say", *The Guardian* (1 October 2016).

besieged city,<sup>175</sup> with over 1,700 bombs dropped on east Aleppo over a single week.<sup>176</sup> Russian forces were also suspected of bombing 18 trucks which were part of an authorised aid convoy for civilians in Aleppo.<sup>177</sup> Rebel forces were heavily criticised for their use of hell cannons, an improvised device which launched explosives and shrapnel at targeted areas, which were frequently aimed at civilians in government-held areas. The use of indiscriminate methods of warfare, alongside the fact that these were targeted at areas populated by non-combatants, presents a strong case for A fulfilling the first limb of the *Sufi* test.

54 Unlike the situation of civil war in Syria, the conflict between Boko Haram and the Nigerian government is characterised more by guerrilla fighting and occasional high-profile attacks. This enables the terrorist organisation to strike fear more effectively into Nigerians living in Maiduguri and other cities in north-eastern Nigeria. For instance, at the height of their power in 2012, Boko Haram carried out their most audacious and lethal attack in Kano, the second largest city in Nigeria, utilising co-ordinated bomb attacks at key political and security installations,<sup>178</sup> resulting in over 178 casualties.<sup>179</sup> In 2013 and 2015, they also conducted brutal massacres in Baga, with estimated death tolls of hundreds for each incident.<sup>180</sup> However, as these dates suggest, these attacks are considerably more sporadic in nature, making it difficult for the situation to qualify as a case of generalised violence. Additionally, Boko Haram could not hold its own against the combined military offensive by Nigeria and its neighbouring countries against Boko Haram in 2015. It was roundly defeated in towns, like Gwoza,<sup>181</sup> which it had formerly controlled for nearly an entire year, and had been driven into the dense Sambisa forest, where they were still pursued by the multilateral forces.<sup>182</sup> As such, their capacity to engage in warfare has significantly diminished, which has restored some peace and stability to

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175 “Syria Conflict: Air Strikes Resume on Rebel-Held Aleppo”, *BBC News Middle East* (15 November 2016).

176 Martin Chulov & Kareem Shaheen, “Sectarian Fighters Mass for Battle to Capture East Aleppo”, *The Guardian* (29 September 2016).

177 Eric Schmitt, Michael R Gordon & Somini Sengupta, “US Officials Say Russia Probably Attacked UN Humanitarian Convoy”, *The New York Times* (20 September 2016).

178 “Nigeria’s Kano Rocked by Multiple Explosions”, *BBC News Africa* (21 January 2012).

179 Mike Oboh, “Islamist Insurgents Kill over 178 in Nigeria’s Kano”, *Reuters* (22 January 2012).

180 Thomas Fessy, “Boko Haram Attack: What Happened in Baga?”, *BBC News Africa* (2 February 2015).

181 “Boko Haram HQ Gwoza in Nigeria ‘Retaken’”, *BBC News Africa* (27 March 2015).

182 Associated Press, “Nigerian Military Claims Destruction of 10 Boko Haram Camps”, *Fox News World* (18 May 2015).

the north-eastern regions of Nigeria.<sup>183</sup> The sporadic nature of Boko Haram attacks and the diminution of Boko Haram's warfare capacity present a weak case for B fulfilling the first limb of the *Sufi* test.

(2) *Whether use of such methods and/or tactics was widespread among parties to the conflict*

55 While it is clear that the Syrian government forces have adopted indiscriminate methods of warfare, there are also concerns that even the rebel fighters have also begun to adopt such tactics, based on reports of rebels launching a large number of rockets into government-held civilian suburbs of Aleppo.<sup>184</sup> According to the UN, "weeks of air strikes and shelling" have resulted in over 700 civilian casualties, while rocket-fire has resulted in "scores dead in government-controlled areas".<sup>185</sup> This reflects how widely used these indiscriminate tactics are by both parties. Moreover, although the Syrian civil war initially began as a conflict between Bashar al-Assad's regime and the secular Free Syrian Army, many other actors emerged during the prolonged period of fighting. The Islamic State of Iraq and Syria and the Russian government are also significant players in the Syrian conflict, and both have faced allegations of indiscriminate and brutal methods of warfare used against civilian-populated areas. Again, this limb is clearly fulfilled in A's case.

56 Although Boko Haram occasionally conducted high-profile indiscriminate attacks in civilian-populated areas, such tactics were not frequently used because they eroded popular support for their causes.<sup>186</sup> Further, while there were substantial allegations that government forces themselves engaged in similar tactics, such as the extrajudicial execution of suspected terrorists,<sup>187</sup> such extrajudicial executions were relatively rare and occurred in isolated incidents. Since indiscriminate methods of warfare did not happen at a sufficiently broad scale or high intensity, this limb is unfulfilled in B's case.

(3) *Whether the fighting was localised or widespread*

57 Most of the fighting is concentrated in the rebel-held areas of Aleppo, which lie in the eastern side of the city. Although this appears

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183 "Nigeria Boko Haram: Militants 'Technically Defeated' – Buhari", *BBC News Africa* (24 December 2015).

184 "UN Envoy on Syria 'Shocked' and 'Appalled' by Indiscriminate Rocket Attack on Western Aleppo", *UN News Centre* (30 October 2016).

185 "Syria Conflict: Air Strikes Resume on Rebel-Held Aleppo", *BBC News Middle East* (15 November 2016).

186 Maram Mazen, "Bloodshed Corrodes Support for Boko Haram", *Aljazeera* (25 May 2014).

187 "World Report 2015: Nigeria – Events of 2014", *Human Rights Watch*.

like a localised conflict, Aleppo was once the largest city in Syria and one of the largest in the eastern Mediterranean.<sup>188</sup> In fact, an estimated 250,000 civilians remain in east Aleppo and are still at threat from the ongoing violence and conflict.<sup>189</sup> Moreover, the fighting has not stopped for a significant period of time since the outbreak of civil war in 2011, save for a few failed ceasefires. Here, this limb is satisfied for A's case.

58 Boko Haram was concentrated in the state of Borno, located in north-eastern Nigeria. Since the multilateral offensive against the terrorist group, they have retreated into the Sambisa forest and a few towns near Lake Chad.<sup>190</sup> As such, the fighting is likely to be very localised in small towns away from the larger and more-densely populated cities in the area. Furthermore, the prospects for peace and stability have led Cameroon to reopen its northern border with Nigeria, further suggesting that the fighting was no longer a widespread threat to the region.<sup>191</sup> Hence, this limb is unlikely to be satisfied for B's case.

(4) *The number of civilians killed, injured, and displaced as a result of the fighting*

59 It is difficult to obtain the numbers for Aleppo specifically because of the collapse of the ceasefire and a resumption in Syrian and Russian bombardment of Aleppo, but according to recent reports, 1,002 civilian casualties were reported from September 2016 to November 2016.<sup>192</sup> Numbers for injuries are even harder to estimate because some patients succumb to their injuries, but it is estimated that 1.88 million Syrians (including those outside Aleppo) have been injured since 2011.<sup>193</sup> It is further estimated that over 7.6 million Syrians are internally displaced with a further 4.6 million seeking refugee status in other countries,<sup>194</sup> accounting for over 45% of the Syrian population. Specifically, over 600,000 people have been displaced from Aleppo from 2011 to 2014, which will understate the true amount of displaced

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188 "Syrian Army, Rebels Wage Fierce Battles in Aleppo", *Reuters* (30 September 2016).

189 Suleiman Al-Khalidi, "Syrian Army Edges Closer towards Rebel Stronghold in Capital", *Reuters* (1 November 2016).

190 Ulf Laessing & Lanre Ola, "Nigerian Army Commander: Only Weeks Left for Boko Haram", *Reuters* (31 August 2016).

191 Divine Ntaryike Jr, "Cameroon Reopens Far North Nigeria Border as Boko Haram Retreats", *Bloomberg* (12 July 2016).

192 "About 4600 Persons Were Killed and Injured Since the Collapse of the Russian-American Truce in Syria", *Syrian Observatory for Human Rights* (15 November 2016).

193 Willa Frej, "Syrian War Has Killed or Wounded More People than Entire Populations of these 15 States", *The World Post* (2 November 2016).

194 "Syria 2015/2016", *Amnesty International*.

persons at the time of consideration.<sup>195</sup> The numbers clearly demonstrate that Aleppo is not a simple situation of civil unrest, but is a city caught in the middle of fierce and brutal fighting between multiple actors. Hence, this limb is likely to be satisfied for A's case.

60 Estimates for civilian deaths are difficult to ascertain, because the instability in the area makes it hard for independent monitors to check reported death tolls.<sup>196</sup> It was estimated, by the John Hopkins University Nigeria Social Violence Database, that there were over 6,000 civilian casualties in 2015 alone, while in the first six months of 2016, this number had dropped to slightly over 1,100.<sup>197</sup> Furthermore, an estimated 2.1 million people were internally displaced in northern Nigeria,<sup>198</sup> although this is likely to improve given the partial restoration of security in the region after the military offensive against Boko Haram. The numbers are considerably smaller than those of Syria. Given the prospects for improvement in the situation, these statistics are also likely to improve as Boko Haram wanes in power and influence in the region. Hence, this limb is unlikely to be satisfied for B's case.

(5) *Outcome under the Sufi test*

61 As observed from the application of the *Sufi* test to the fictional examples of A and B, it is clear that A, but not B, would be granted refugee status under the expanded refugee definition which recognises generalised violence as a legitimate reason for seeking asylum. Under the existing Convention, it is more likely that both A and B would not have qualified for refugee status. To begin with, there seems to be no persecution involved in A's case, since the main threats come from indiscriminate methods of warfare, and there is also no clear connection to any of the Convention grounds, since none of them are relevant or have been adduced in defence of the military attacks on Aleppo. Further, the *Sufi* test dealt effectively with the situations in Syria and Nigeria by correctly recognising that Nigeria's case was characterised by sporadic violence rather than generalised violence. Seen in this light, the *Sufi* test is capable of distinguishing between asylum-seekers with legitimate refugee claims and economic migrants, thereby avoiding the common objection that expanding the Convention definition would open the floodgates for millions of refugee applications. Although these examples

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195 "A Report on the Internally Displaced People in the Surrounds of Aleppo", *Violations Documentation Center in Syria* (March 2014).

196 "The Baga Incident and the Situation in North-East Nigeria: An Interim Assessment and Report", *The National Human Rights Commission* (June 2013) at p 14.

197 Nathaniel Allen, "Charting Boko Haram's Rapid Decline", *War on the Rocks* (22 September 2016).

198 "Nigeria 2015/2016", *Amnesty International*.

are fictional, the details and applications are very closely aligned with reality. The *Sufi* test enables a more intricate understanding of modern-day refugee crises than the current framework allows for, and hence is better able to identify asylum-seekers who genuinely deserve refugee protection.

### **B. Practical implications and concluding remarks**

62 This article has sought to propose a legal framework for ascertaining the level of generalised violence in a country which justifies granting asylum-seekers fleeing from those circumstances refugee status. By drawing on the test developed in *Sufi*, this would enable lawmakers and judicial authorities to make such decisions using a recognised set of criteria to assess the level of generalised violence.

63 However, it must be acknowledged that although expanding the definition is the most desirable way to extend protections to those seeking asylum from generalised violence, it suffers from one obvious and critical constraint: the lack of political will. This calls into question the feasibility of such a proposal, but political will may not be as lacking as some sceptics claim. In the recent NY Declaration, states indicated a commitment to increase the number and range of legal pathways for refugees to be admitted, which include expanding humanitarian admission programs.<sup>199</sup> This suggests broad agreement on the importance of affording more protection to those with legitimate refugee claims, especially those that are falling through the cracks of the Convention. States have even agreed to begin a series of consultations on this issue over the next two years, culminating in the eventual adoption of the Global Compact on Refugees (“GCR”) in 2018.<sup>200</sup> Although the NY Declaration and the GCR are non-binding agreements, they, nevertheless, indicate support and dedication from states to increase protection for individuals fleeing generalised violence. The subsequent follow-up actions by states can form relevant state practice, and, if accompanied by *opinion juris*, can crystallise a rule of international custom as regards the definition of refugees. This is particularly encouraging for the development of refugee frameworks in regions such as Southeast Asia, which lack a binding regional instrument for refugee issues.

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199 General Assembly Resolution 71/1, *New York Declaration for Refugees and Migrants*, A/RES/71/1 (resolution adopted by the General Assembly on 19 September 2016) at paras 77–86.

200 General Assembly Resolution 71/1, *New York Declaration for Refugees and Migrants*, A/RES/71/1 (resolution adopted by the General Assembly on 19 September 2016) at paras 18–19.

64 Notwithstanding the adoption of the NY Declaration and the GCR, there is still a strong need to push for an expanded definition of refugees. For one, non-binding agreements are precarious as their fulfilment depends heavily on the political climate. States have flip-flopped on their stances towards refugees in response to domestic opposition, such as in the case of Denmark and Germany that have both reversed their official policies on accepting asylum-seekers from the Middle East.<sup>201</sup> Codifying the obligation to protect asylum-seekers fleeing generalised violence would provide a more stable protection framework for refugees. For another, some regions, such as Southeast Asia, have less robust regional refugee frameworks than others. Waiting for custom to crystallise organically in these areas is likely to take a long time and is fraught with uncertainty. However, Malaysia's recent announcement on Rohingya refugees marked a promising departure from the traditional practice of refusing to recognise refugee claims by asylum-seekers from other countries.<sup>202</sup> Furthermore, Timor-Leste, the Philippines, and Thailand participated in the roundtable sessions at the NY Declaration,<sup>203</sup> signalling a growing recognition of refugee rights and a willingness to participate in the global discourse on the issue. Thus, it may not be fanciful to suggest that although political will is a problem presently, there are some encouraging signs which indicate that it is not impossible for states in the future to agree to expand the definition.

65 At any rate, the Convention is rightly recognised as the cornerstone of international refugee protection. It crystallised a unified and global commitment from states to offer protection and assistance to asylum-seekers fleeing their countries, and established a legally binding framework of rights accorded to refugees. However, the international refugee framework must avoid being trapped within the paradigm of its past. For the Convention to effectively serve its purpose through the generations, it must constantly re-assess its ability to recognise and protect refugees in light of changing circumstances. The recent NY Declaration "fills what has been a perennial gap in the international refugee protection system – that of truly sharing responsibility for refugees".<sup>204</sup> But the work should not end here. The Convention grounds

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201 Patrick Kingsley, "UN Backlash against Call to Scale Back Geneva Convention on Refugees", *The Guardian* (7 January 2016); Matthew Karnitschnig & Florian Eder, "Why Merkel Changed Her Mind", *Politico* (17 September 2015).

202 Associated Press, "Malaysia PM Urges World to Act against 'Genocide' of Myanmar's Rohingya", *The Guardian* (4 December 2016).

203 See United Nations Office of the Permanent Representative/Permanent Observer's provisional lists of speakers for the round tables (dated 15 September 2016) at pp 6, 9 and 14, available at <http://refugeesmigrants.un.org/provisional-lists-speakers-round-tables> (accessed 7 December 2017).

204 Filippo Grandi, "Opening of the High-Level Meeting to Address Large Movements of Refugees and Migrants", opening remarks delivered at the Headquarters of the United Nations (19 September 2016).

and focus on persecution still cause systematic problems in the recognition of legitimate refugee claims.

66 The proposal here is especially relevant in light of the consistent increase in the frequency and intensity of generalised violence against civilians in conflicts today. For instance, between 2011 and 2015, annual civilian deaths and injuries from explosive violence rose by around 54%.<sup>205</sup> The International Network on Explosive Weapons has already stated that bombing populated areas is a significant factor in the current unprecedented levels of mass displacement caused by conflict, both within and between states.<sup>206</sup>

67 Furthermore, clarifying the legal pathways for such asylum-seekers to seek refuge in other states is also important to the asylum-seekers themselves. For most of them, the violence they were subject to back in their home country can feel targeted, on any of the Convention grounds, even if the objective facts do not suggest that. This is the practical implication of the uncertainty surrounding the intentions of the generalised violence as argued earlier – governments may shroud their genuine motives with the pretence of maintaining order and stability, and thus conceal the fact that such actions are *de facto* targeted at particular groups of people. Expanding the Convention to include generalised violence will reduce such ambiguity and encourage asylum-seekers to bring their cases forward without fear that their application will ultimately be rejected. Official recognition will also serve to duly acknowledge the harrowing experiences which many asylum-seekers previously endured in their home country, especially given the high threshold proposed under the *Sufi* test. This is particularly relevant in light of the growing resentment towards asylum-seekers in Europe, where a substantial proportion of the complaints are targeted at approving unmeritorious asylum applications.

68 For an expansion of the refugee definition to be practically effective, an important consideration is the general enforceability of the obligations under the Convention. This has not been addressed in this article given that the scope of this article is confined to proposing a solution to the increasing number of refugees fleeing due to generalised violence. Yet, a real problem plaguing the Convention that should be explored is how to prevent states from circumventing their obligations under the Convention. The unfortunate reality is that some states have commonly shot asylum-seekers that are trying to reach their borders in

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205 Chris Hitchcock, “Patterns of Harm: Five Years of Explosive Violence 2011–2015” (June 2016) *Action on Armed Violence* at p 3.

206 “Bombing in Towns and Cities: A Major Driver of Displacement Worldwide”, *Article 36* (16 May 2016).



order to prevent them from entering their borders,<sup>207</sup> or turned them away from their borders.<sup>208</sup> Other states leave violence and abusive actions against asylum-seekers that have entered their borders unchecked.<sup>209</sup> It is worth stating that the international community should continue consistently condemning the circumvention of the Convention, as they have done thus far.<sup>210</sup> But this is an issue that should be examined and explored separately to improve the effectiveness of the Convention.

69 Another important practical consideration is whether the expanded refugee definition would place an undue burden on receiving states. This has not been addressed in this article given that the main aim of this article is to propose an expansion of the refugee definition on a normative level. However, there must be further discussion directed at formulating a burden-sharing framework to distribute some of the increased burden on receiving states. Otherwise, the definition, even if expanded, would not be worth the paper it is written on if receiving states cannot cope with the increase influx of refugees. Opponents of an expanded refugee definition may use the increased burden on states as a reason against expansion. However, when addressing what international law should be, it is crucial to begin with the normative as our compass; the attendant practical difficulties are valid concerns, but they should never overshadow the aspirations we have for our international legal system and the rights enshrined therein. This is particularly so in the area of human rights law where what is an easy standard to meet is often not ideal. Hence, an increased burden on states should not be used as a reason against expanding the definition. Instead, it should be recognised as a hurdle that is worth overcoming because of the normative reasons for an expanded refugee definition.

70 In conclusion, the following lines from “Home”, a poem by British-Somali poet Warsan Shire, are very pertinent here:

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207 Ashley Cowburn, “Syrian Refugee Shot by Border Guards Trying to Enter Slovakia from Hungary”, *Independent Europe* (9 May 2016); “Turkey: Border Guards Kill and Injure Asylum-Seekers”, *Human Rights Watch* (10 May 2016).

208 Associated Press, “Malaysia and Thailand Turn Away Hundreds on Migrant Boats”, *The Guardian* (14 May 2015).

209 “Bulgaria: Pushbacks, Abuse at Borders”, *Human Rights Watch* (20 January 2016); Lizzie Dearden, “Leaked Documents Reveal ‘Abuse and Mistreatment’ of Refugees at Australian Offshore Detention Centre”, *Independent Australasia* (10 August 2016); “Hungary: Appalling Treatment of Asylum-Seekers a Deliberate Populist Ploy”, *Amnesty International* (27 September 2016).

210 Patrick Kingsley, “Refugees Scramble for Ways into Europe as Hungary Seals Borders”, *The Guardian* (15 September 2015); “Turned Away”, *The Economist* (10 December 2015).

[N]o one leaves home unless  
home is the mouth of a shark[; and]  
... no one puts their children in a boat  
unless the water is safer than the land ...

Her words remind us of our moral obligations to fellow human beings seeking refuge from the scourges of war, and implicitly of our failure to live up to those duties. This article has sought to propose a much-needed expansion of the refugee definition to include asylum-seekers fleeing generalised violence, a category which has largely been neglected thus far. Yet, it is also recognised that there are drawbacks to this proposal, such as the constraint of political will, which is worth examining in-depth, perhaps in a separate endeavour due to word constraints. Nonetheless, the international community should remain cognisant of the fact that offering refugee protection to these individuals is but one dimension of the multifaceted solution. The legal acceptance of refugees must be accompanied by a shift in the attitudes towards refugees. They should not be viewed as burdens to the State, but rather as fellow humans with genuine and equal claims to basic security and autonomy, and who were unfortunate to be plunged into the midst of conflict and warfare.<sup>211</sup> Additionally, the international community must strive to address the deeper roots of conflict to prevent them from arising time and again.<sup>212</sup> The recognition and legitimisation of refugee claims by those fleeing generalised violence is only the first step in solving this greater problem. There is perhaps no better time than now to seriously re-evaluate the legal framework for refugees; if we do not begin now, when will it ever be a good time?

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211 Ban Ki-moon, opening address delivered at the UN General Assembly Summit for Refugees and Migrants (19 September 2016) (unpublished).

212 Ban Ki-moon, “Remarks on Forced Displacement: A Global Challenge”, United Nations Secretary-General, statement delivered in Washington, DC (15 April 2016).